CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 27 FEBRUARY 3, 1993 NO. 5

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 93–5)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback contracts approved June 13, 1990 to September 14, 1992, inclusive, pursuant to Subpart C, Part 191, Customs Regulations; and approvals under Treasury Decision 84–49.

In the synopses below are listed for each drawback contract approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the proposal was signed, the basis for determining payment, the Regional Commissioner to whom the contract was forwarded or approved by, and the date on which it was approved.

Date: January 12, 1993.

JOHN DURANT,
Director,
Commercial Rulings Division.

(A) Company: Abbott Laboratories
Articles: Vitamin mineral premix
Merchandise: Taurine (food supplement); niacinamide powder; calcium pentothenate: thiamine hydrochloride powder; pyridoxine hydrochloride; riboflavin; biotin; folic acid powder
Factories: North Chicago & Abbott Park, IL
Proposal signed: April 30, 1992
Basis of claim: Used in
Contract forwarded to RC of Customs: Chicago, August 4, 1992

(B) Company: Abbott Laboratories
Articles: Temafloxacin hydrochloride; vinylogous amide; tetrafluoroquinolone (TFQ); TFQ ester
Merchandise: 2-chloro-4,5-difluorobenzoic acid (CDFBA); diethyl malonate; 2,4-difluoroaniline; 2-chloro-4,5-difluoro-phenyl-3-oxo propanoic acid (BKE); 2-methylpiperazine
Factories: North Chicago & Abbott Park, IL
Proposal signed: July 9, 1992
Basis of claim: Used in
Contract forwarded to RC of Customs: Chicago, September 8, 1992
Revokes: T.D. 91–92–A

(C) Company: Adheron Coatings Corp.
Articles: Coil coatings
Merchandise: Alkyd resins; titanium dioxide
Factory: Oak Forest, IL
Proposal signed: November 1, 1991
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, July 13, 1992

(D) Company: AEP Industries, Inc.
Articles: Polyethylene film
Merchandise: Linear low and high density polyethylene resins
Factories: Moonachie, NJ; Waxahachie, TX; Chino, CA; Matthews, NC
Proposal signed: April 10, 1992
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, August 14, 1992

(E) Company: Axel Johnson Netals, Inc.
Articles: Titanium ingots and slabs and mill products such as billet, bar, sheet, strip, skelp, tube, etc.
Merchandise: Titanium sponge containing at least 99.3% titanium; scrap containing at least 99.0% titanium (to be substituted for the titanium sponge on a pound-for-pound basis of the titanium content); titanium ingot containing at least 99% titanium
Factories: Lionville & Morgantown, PA
Proposal signed: February 13, 1992
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, August 10, 1992
Revokes: T.D. 91–45–I

(F) Company: BASF Corp.
Articles: Quinchlorac (Face)
Merchandise: Amino chlorotoluene (ACT)
Factories: Freeport, TX; State College, PA
Proposal signed: April 24, 1990
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, July 12, 1990

(G) Company: Canon Business Machines, Inc.
Articles: Ribbon cassettes
Merchandise: Pre-inked ribbon
Factory: Costa Mesa, CA
Proposal signed: May 21, 1992
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, September 10, 1992

(H) Company: Chevron Chemical Co.
Articles: Lubricating oil additives
Merchandise: OLOA 2465 and OLOA 247Z (calcium sulfonates)
Factory: Belle Chasse, LA
Proposal signed: November 6, 1991
Basis of claim: Used in
Contract forwarded to RCs of Customs: New Orleans & Houston, August 3, 1992

(I) Company: Chevron Chemical Co.
Articles: Orthene pesticide (various formulations)
Merchandise: o,o-dimethyl phosphorochloridothioate (DMPCT)
Factory: Richmond, CA
Proposal signed: February 16, 1990
Basis of claim: Used in
Contract forwarded to RCs of Customs: Houston & Los Angeles (San Francisco Liquidation), June 13, 1990
Revokes: T.D. 74–95–T

(J) Company: ConAgra, Inc.
Articles: Cleaned, blended, and graded wheat; blended and graded wheat
Merchandise: Various classes and grades of wheat
Factories: Paulina, LA; Hastings & St. Paul, MN; Superior (Connors Point), WI; Buffalo, NY; Decatur, Il; Fremont, NE; Sherman, TX; Tampa, FL; Treichlers & Martins Creek, PA; Columbus, OH; Commerce City, CO; Oakland, CA
Proposal signed: May 11, 1992
Basis of claim: Appearing in
Contract issued by RC of Customs in accordance with § 191.25(b)(2): Chicago, June 19, 1992
Revokes: T.D. 90–91–E

(K) Company: Cos-Mar Co.
Articles: Styrene monomer; ethylbenzene; toluene
Merchandise: Benzene; ethylene; ethylbenzene
Factory: Carville, LA
Proposal signed: May 26, 1992
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to RC of Customs: Houston, July 31, 1992
Revokes: T.D. 91–86–E (Fina Oil and Chemical Co.)

(L) Company: E. I. du Pont de Nemours and Co.
Articles: Nicosulfuron herbicides ("Accent" 75 DF, "Challenger" 75 DF, "Nisshin" 75 DF); bensulfuron methyl herbicide ("Londax" 60 DF)
Merchandise J290-2 pyrimidinamide, 4,6 dimethoxy; U9069-carbamic acid [3-((dimethylamino) (carbonyl)) 2 pyridinyl sulfonyl] phenyl ester
Factories: Belle, WV; El Paso, IL
Proposal signed: July 9, 1991
Basis of claim: Used in
Contract forwarded to RCs of Customs: Boston & New York, July 13, 1992

(M) Company: Georgia Gulf Corp.
Articles: Isopropylbenzene (a/k/a cumene)
Merchandise: Refined benzene; propylene; solid phosphoric acid
Factory: Pasadena, TX
Proposal signed: April 11, 1989
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to RC of Customs: New York, October 10, 1991

(N) Company: The Goodyear Tire & Rubber Co.
Articles: Automotive hydraulic brake hose
Merchandise: Polyvinyl alcohol filament yarn
Factory: Sun Prairie, WI
Proposal signed: July 13, 1992
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, July 24, 1992

(O) Company: Hilton Davis Co.
Articles: FD&C Blue #1; Hidacid azure blue liquid 50%; Hidacid azure blue powder; Hidacid azure blue liquid 65; Hidacid azure blue powder DSLS
Merchandise: Ortho chlorobenzaldehyde (OCB)
Factory: Cincinnati, OH
Proposal signed: July 31, 1991
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, July 13, 1992

(P) Hoechst Celanese Corp., Specialty Chemicals Group
Articles: 6-bromo-2,4-dinitroaniline
Merchandise: 2,4-dinitroaniline
Factory: Coventry, RI
Proposal signed: December 23, 1991
Basis of claim: Used in
Contract forwarded to RC of Customs: Miami, July 21, 1992

(Q) Company: Miles Inc.
Articles: GLUCOFILM TM test strips
Merchandise: GLUCOFILM TM
Factory: Elkhart, IN
Proposal signed: April 20, 1992
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, September 9, 1992

(R) Company: Occidental Chemical Corp.
Articles: Ethylene dichloride
Merchandise: Ethylene
Factories: Convent, LA; Corpus Christi & Deer Park, TX
Proposal signed: March 20, 1992
Basis of claim: Used in
Contract forwarded to RC of Customs: Houston, July 22, 1992

(S) Company: Outokumpu American Brass, Inc.
Articles: Copper sheet, strip, roll, bar, wire, pipe, tube, or extruded shapes, either bare or coated with tin or other metallic coating
Merchandise: Copper ingots and cathodes
Factories: Buffalo, NY; Kenosha, WI; Franklin, KY
Proposal signed: August 10, 1992
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Chicago, September 8, 1992
Revokes: T.D. 90–28–B

(T) Company: OxyMar
Articles: Vinyl chloride monomer
Merchandise: Ethylene
Factory: Gregory, TX
Proposal signed: March 30, 1992
Basis of claim: Used in
Contract forwarded to RC of Customs: Houston, August 20, 1992

(U) Company: RTP Co.
Articles: Molding resins
Merchandise: Polyethersulfone
Factories: Winona, MN; South Boston, VA
Proposal signed: March 20, 1992
Basis of claim: Used in
Contract forwarded to RC of Customs: Miami, July 20, 1992

(V) Company: Reynolds Consumer Products, Inc., d/b/a Presto Products Co.
Articles: Food contact bags: disposer bags; blown pallet wrap film
Merchandise: Linear low density polyethylene resins
Factories: Appleton & Weyauwega, WI; South Boston, VA; Lewiston, UT
Proposal signed: March 27, 1992
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Chicago, August 7, 1992

(W) Company: Rite Industries, Inc.
Articles: Dyestuffs
Merchandise: Dyes
Factory: High Point, NC
Proposal signed: May 19, 1992
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, September 9, 1992

(X) Company: Schering Corp.
Articles: (R,R)-2-hydroxy-5-[1-hydroxy-2-[(1-methyl-3-phenylpropyl) amino]-ethyl] benzamide a/k/a dibenzoyl-L-tartrate a/k/a (LBS-J); 5-[(R)-1-hydroxy-2-[(R)-1-methyl-3-phenylpropylamino] ethyl] salicylamide-2, 3-di-o-benzoyl-(+)-tartaric acid (1/1) a/k/a (DVL-J, JJ, JS, JJS, JH, JJH, JHS, JJHS; [R-(R*, R*)]-2-hydroxy-5-[1-hydroxy-2-[(1-methyl-3-phenylpropyl)amino]ethyl] benzamide-hydrochloride a/k/a dilevalol hydrochloride or DVL-K; dilevalol hydrochloride tablets, compressed or milled
Merchandise: 5-acetylsalicylamide (5-ASA); 5-bromoacetyl-2-hydroxybenzamide (5-bromoacetyl-salicylamide; 5-bromoASA); R-(–)-methyl-3-phenylpropylamine a/k/a (R(–)-1-phenyl-3-aminobutane; benzenepropane-amine,-methyl,R(–): R-amine; or R(–) MPPA); (–)-dibenzoyl-L-tartaric acid monohydrate (DBTA); dilevalol hydrochloride (DVL-K)
Factory: Union, NJ
Proposal signed: April 12, 1991
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, September 14, 1992

(Y) Company: Ventura Coastal Corp.
Articles: Orange juice from concentrate (reconstituted); frozen concentrated orange juice; bulk concentrated orange juice
Merchandise: Concentrated orange juice for manufacturing
Factory: Ventura, CA
Proposal signed: May 15, 1992
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Long Beach, July 17, 1992

(Z) Company: Ventura Coastal Corp.
Articles: Grapefruit juice from concentrate (reconstituted juice); frozen concentrated grapefruit juice; bulk concentrated grapefruit juice
Merchandise: Concentrated grapefruit juice for manufacturing
Factory: Ventura, CA
Proposal signed: May 15, 1992
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Long Beach (San Francisco Liquidation), August 3, 1992

APPROVALS UNDER T.D. 84–49

(1) Company: Crown Central Petroleum Corp.
Articles: Various petroleum products
Merchandise: Crude petroleum and petroleum derivatives
Factory: Houston, TX
Proposal signed: December 16, 1991
Basis of claim: As provided in T.D. 84–49
Contract forwarded to RC of Customs: Houston, August 13, 1992

(2) Company: Diamond Shamrock Refining and Marketing Co.
Articles: Polymer grade propylene; HD5 propane
Merchandise: Refinery grade propylene (Propane/Propylene mix)
Factory: Mt. Belvieu, TX
Proposal signed: March 18, 1991
Basis of claim: As provided in T.D. 84–49
Contract forwarded to RCs of Customs: Houston & New York, August 21, 1992

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19 CFR Parts 118, 151, and 178

CENTRALIZED EXAMINATION STATIONS

(T.D. 93–6)

RIN 1515–AB10

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to set forth a regulatory framework for the establishment, operation and termination of Centralized Examination Stations (CESs). A CES is a privately operated facility at which imported merchandise is made available to Customs officers for physical examination. These regulatory amendments will allow Customs to better use its inspectional resources and clear higher volumes of cargo.

EFFECTIVE DATE: February 22, 1993.

FOR FURTHER INFORMATION CONTACT: Patricia Duffy, Office of Inspection and Control (202–927–1344).

SUPPLEMENTARY INFORMATION:

BACKGROUND

In recent years there has been a significant increase in the number of Container Freight Stations (CFSs), bonded warehouses, truck and rail terminals, and other facilities which receive and hold imported cargo for purposes of examination and clearance by Customs. As a result of this increase, and due to the fact that these facilities often are not in close proximity to each other within a given port of entry, Customs inspectors have had to spend a greater proportion of their time traveling from one location to another in order to perform cargo examinations necessary to ensure compliance with the law. This increase in travel time has had a negative effect on Customs productivity, has complicated Customs efforts to properly allocate personnel to meet its workload, and has had a corresponding negative effect on Customs ability to render efficient clearance and related services to the importing community.

The Centralized Examination Station (CES) program was developed by Customs in order to address the problems outlined above. A CES is a privately operated facility at which imported merchandise identified by Customs for physical examination is made available to Customs inspectors for that purpose. Once Customs identifies merchandise for examination, the importer or the importer's agent is responsible for selecting the CES to be used (where there is more than one CES within the port and unless the District Director of Customs has reason to make the selection), for arranging the bonded transfer of the merchandise to the CES, and for paying the costs of the transfer as well as any fees charged by the CES facility for its services. The services which the CES operator renders are for the benefit of the importer (who is required under law to make the imported merchandise available to Customs for inspection) and involve storage of the merchandise under bond and with liability insurance, opening the container in which the merchandise is packed, presenting the merchandise to the Customs inspector for examination, and closing the container after examination. A CES may consist of a preexisting warehouse, freight station, terminal or similar facility or portion thereof or may be an entirely new facility developed specifically for operation as a CES. Each CES is designated as such by Customs through a specific application and selection process, and the operation of each CES is governed by a written agreement executed by the selected CES operator and Customs prior to commencement of the CES operation.

Experience with the CES program has shown that CESs provide benefits to both Customs and the trade community. By reducing the number of locations at which examinations are performed, Customs is able to more efficiently allocate inspectional resources while at the same time

performing more intensive and effective examinations. In addition, a CES enables Customs to provide improved inspectional supervision and ensure more timely and predictable service to importers by Customs officers. By streamlining the cargo inspection process, CESs ultimately allow Customs to clear higher volumes of cargo and thus improve the overall importation/entry process.

In order to provide an appropriate regulatory framework for the CES program, on July 23, 1991, Customs published a notice in the Federal Register (56 FR 33734) proposing to amend the Customs Regulations (19 CFR Chapter I) by adding thereto a new Part 118 entitled "Centralized Examination Stations". Proposed new Part 118 incorporated four subparts: Subpart A contained general provisions regarding the establishment and operation of a CES; Subpart B set forth the specific requirements and procedures for the establishment of a CES; Subpart C set forth rules governing the movement of cargo to a CES; and Subpart D covered the termination of a CES. The public comment period on the proposed regulations closed on September 23, 1991.

ANALYSIS OF COMMENTS

A total of 39 commenters responded to the solicitation of comments during the public comment period. The comments received, and the Customs responses thereto, are set forth below.

Comment:

Several commenters suggested that the regulations should prohibit a broker or CFS operator from being selected as a CES operator because of the potential for obtaining a competitive edge in selling its non-CES services. One commenter stated that if a CES operator is a broker or is broker-affiliated, the regulations should prohibit the giving of a preference to its brokerage clients and their entries. Motivated by similar competitive concerns, one commenter suggested adding specific language to section 118.4 to prohibit a CES operator from disclosing any of an importer's confidential business information except to Customs and to provide that any such improper disclosure could result in Federal prosecution and/or cancellation of the CES agreement.

Customs response:

With regard to the general relationship between competitive advantage and the CES selection process, the most important consideration remains selection of the applicant best qualified to be a CES operator. Accordingly, Customs believes that the mere potential for obtaining a competitive advantage, so long as that advantage is consistent with normal business practices and does not violate the letter or spirit of applicable Customs laws and regulations, is not a proper basis for limiting the field of potential CES operator applicants as suggested by these commenters. As regards a broker or broker-affiliate CES operator giving preferences to its brokerage clients, Customs believes that the regulations as proposed already address this both by giving to Customs the initial role in determining whether a CES examination will take place and

by providing for a basic "first come-first served" operating principle in section 118.4(b).

Customs does not agree with the suggestion to amend section 118.4 to prohibit disclosure of an importer's confidential business information. A CES operator does not have access to invoices, bills of lading, entry summaries and other documents in the entry package which may contain confidential business information. Moreover, since the CES operator is in effect operating for the benefit of the importer, any disclosure of information to the detriment of the importer should be dealt with as a private matter between those parties and thus is not an appropriate matter for these regulations.

Based on the above analysis, Customs no longer believes that it is necessary to require submission of information regarding possible conflicts of interest in the application process. Accordingly, section 118.11 as set forth below has been modified by removing proposed paragraph (h) and redesignating (i) as (h).

Comment:

Several commenters suggested a different duration for the agreement to operate a CES. One commenter wanted a 5–7 year term rather than the proposed 3–5 year term, one commenter suggested no pre-set term, and one commenter requested a 1–3 year term. The commenters in favor of a longer term reasoned that this would permit a business to recover the expenses of starting a CES without having to charge high fees to do so.

Customs response:

Customs agrees that a duration of more than 5 years will encourage some potential CES operators to make the economic commitment necessary to begin operations. However, Customs still believes a limitation on the duration of an operator's agreement is necessary to keep an operator responsive to those using the CES services and to importing trends. Accordingly, section 118.3 as set forth below has been modified to provide for agreements of from 3 to 6 years.

Comment:

Six commenters suggested adding a requirement that there be at least two CESs in any port in order to promote competition so as to keep fees reasonable and allow for choice by the importer.

Customs response:

Although Customs agrees in principle that competition is desirable, the number of CESs within a given port more properly should be a function of the volume of examinations to be performed, the availability of Customs resources to perform them, and the willingness of private parties to operate a CES. Accordingly, requiring a minimum of two CESs in a given port would not be appropriate.

Comment:

Two commenters stated that section 118.3 was too restrictive in that it would not allow a CES agreement to be transferred under certain conditions such as inheritance by children of the operator or upon sale of stock in a company operating a CES.

Customs response:

Customs does not agree that the transfer of an agreement should be permitted even under the special circumstances cited by these commenters. Customs performs background checks on applicants as part of the CES operator selection process, and any transfer of an agreement executed by the selected operator would undermine the purpose behind the background check and thus could ultimately compromise the ability of Customs to perform effective compliance examinations. In addition, Customs considers as material factors in the selection process the physical plant to be used as the CES and the applicant's experience in handling international cargo. Further, it would not be fair to potential users of the CES, or to operator applicants who were not selected, to permit transfer of an operator's agreement.

Comment:

Two commenters stated that section 118.2 should be modified to provide for wider dissemination of notice that a CES is to be established or that the term of an existing CES is about to expire. In addition to the proposed posting of a written bulletin at the customhouse, these commenters suggested including publication in the Federal Register, in the CUSTOMS BULLETIN, in local newspapers, in trade journals, and in regional and district pipelines.

Customs response:

Customs agrees that it would be beneficial to have wider dissemination of the notice of intent to establish a CES or of expiration of an existing CES term, but Customs also believes that such wider dissemination should not include publications of national interest and circulation but rather should be limited to local distribution channels which are more likely to reach the potential applicants and other interested parties. Accordingly, section 118.2 as set forth below has been modified to provide the district director with more flexibility as regards the local channels to be used for disseminating the notice. In addition, the regulatory text has been changed to refer to a written "notice" rather than "bulletin" since more than posting at the customhouse could be involved under the section as so modified.

Comment:

Nine commenters stated that there should be greater consultation with the importing community both when the district director is considering whether a new CES should be established and during the operation of any established CES. A number of these commenters stated that the CES committee (the permissive use of which was provided for in pro-

posed section 118.12 in connection with the review of applications) should be used for these purposes as well, that use of the CES committee should be mandatory for all such purposes under the regulations, and that private sector representation on the CES committee should reflect a broad cross-section of the trade community. With regard to use of a CES committee in reviewing applications, one commenter suggested that a CES committee should not have non-Customs (that is, private sector) members because existing business relationships could improperly influence the selection process.

Customs response:

The comments submitted suggest a basic problem with the CES committee concept: while recognizing that a membership consisting of only Customs personnel would not address the need for private sector input in the decision-making process, Customs also believes that it would be difficult to select members from the private sector in such a way as to avoid complaints from one party or another regarding the procedures or results of the member selection process or regarding potential conflicts of interest relating to the committee's intended functions. In addition, the legal requirements that would apply to a CES committee with non-governmental members under the Federal Advisory Committee Act, 5 U.S.C. App. 2, which include publication of a notice in the Federal Register both when an advisory committee is initially established and whenever such a committee is planning to meet, would be particularly cumbersome in a CES context because (1) the decision to create or convene a CES committee would normally be made at the local level whereas publication of notices in the Federal Register is always initiated at Customs Headquarters and (2) the additional time needed to prepare and approve a notice for publication in the Federal Register would only further delay the establishment of a needed CES, thus frustrating the purpose behind the CES program. For these reasons, Customs has concluded that CES committees should not be used for any purpose under the regulations.

Notwithstanding this decision to do away with the CES committee concept, Customs agrees that input from the private sector would be beneficial to the trade and to the CES program, not only in connection with the CES operator selection process as originally provided in proposed section 118.12 but also in connection with the basic determination to establish a CES (or to accept new applications if an existing CES term is about to expire and the district director believes that a CES operation is still needed) under section 118.2. Accordingly, in addition to the public notification procedure changes discussed above and in order to provide a clear context for public procedures, section 118.2 as set forth below has been modified (1) to refer both to the district director's preliminary determination to establish a new CES and to the district director's belief that a CES operation is still needed when the term of a CES is about to expire and (2) in either situation, to provide for submission of relevant comments from the general public within 30 days after publica-

tion of the notice that applications are being accepted. In addition, the following changes have been incorporated in section 118.12 as set forth below: (1) the sentence regarding use of a CES committee has been removed; (2) a new opening sentence has been added to provide for public notice and comment procedures (with a cross-reference to section 118.2 for this purpose) with the notice setting forth specific information relevant to each submitted application (the applicant's name, the location of the CES facility, the proposed fee schedule, an equipment list, and the number of employees); (3) the remainder of the section has been modified to refer to the review of public comments submitted under sections 118.2 and 118.12 and to reflect the possibility that the district director may decide not to select a CES operator (either because it has been decided not to establish or retain a CES or because a suitable applicant has not come forward); and (4) the title of the section has been changed to read "action on application" because the section as modified covers more than merely the review of applications. Finally, in order to ensure trade community awareness of the existence of the CES, section 118.13 as set forth below has been modified to provide for local publication of a notice advising the public of the selection of the CES operator and of the date on which the CES operation will commence.

With regard to private sector input during the operation of a CES, Customs does not believe that it is necessary or appropriate to make formal provision for such input in these regulations. While information regarding the ongoing operation of a CES would be of interest to Customs (in particular as regards observance of CES operator responsibilities under section 118.4), Customs believes that existing informal procedures, whereby any importer or other private party may bring a complaint or other relevant information to the attention of the district director, are sufficient for this purpose. Moreover, in a case involving a CES operator who reapplies when his authority to operate the CES is about to expire, the notice and comment procedures described above will afford the public ample opportunity to comment on that CES operation.

Comment:

One commenter stated that, in order to avoid unnecessary expenditures, a CES applicant should not be disqualified for failure to meet one or two specific selection criteria in section 118.11 so long as the applicant agrees to comply with such criteria within 30 days if selected.

Customs response:

Customs believes that this commenter has a valid point as regards the avoidance of unnecessary expenditures in the event that a particular applicant is not selected as the CES operator. However, Customs believes that this principle should be limited to cases involving a significant capital expenditure to make an existing facility conform to security and other physical or equipment requirements necessary for the CES operation. Accordingly, section 118.11(b) as set forth below has been modified

to give the district director the authority in such circumstances, and if an applicant so requests in the application, to permit the applicant to meet security and other physical or equipment requirements within up to 30 days after tentative selection but with the proviso that the agreement to operate the CES shall not be executed (and thus the selection does not become final and the CES operation may not commence) until the facility conforms to those requirements.

Comment:

One commenter stated that the regulations should allow an unsuccessful applicant the opportunity to appeal the nonselection by providing any relevant supplementary information within 10 days, and this commenter further suggested that any selection should be subject to a 180-day probationary period in case a more qualified applicant appeared after the selection was made or in case the selected applicant is unable to operate properly.

Customs response:

Customs does not agree with these proposals because they would unnecessarily lengthen, and add uncertainty to, the selection process. Moreover, the problem of a CES selectee operating improperly is adequately covered by the provisions regarding selection revocation and agreement cancellation.

Comment:

Eight commenters expressed concern about the responsibility for cargo both while it is being moved to a CES and while it is at the CES. To address these concerns, these commenters suggested the following amendments to the proposed regulatory texts: clarifying the definition of a CES as a place not in the charge of a Customs officer; requiring operators to carry a minimum of $1 million liability insurance; requiring that such liability insurance cover all damage to merchandise; holding the CES operator liable for any duties or taxes on lost or stolen merchandise; including the broker's importation and entry bond as one of the bonds under which merchandise is transferred; and specifically prohibiting any non-bonded transfer of merchandise. Another commenter stated that the reference to a "performance bond" in the first sentence of section 118.4(g) was unclear and suggested that the text be revised to state that the CES operator agrees that "the terms of its custodial bond will apply to the CES operation".

Customs response:

Before responding to the above comments, an issue concerning the organization of the regulations must be addressed. It is noted in this regard that proposed Subparts A, B, and D of new Part 118 set forth general provisions and establishment and termination rules applicable to CESs, whereas proposed Subpart C (consisting of sections 118.21–118.24) sets forth specific procedures and requirements for the movement of merchandise to a CES for purposes of examination. It is

further noted that Part 151 of the Customs Regulations (19 CFR Part 151) concerns the examination, sampling and testing of merchandise and, in Subpart A thereof, sets forth certain basic requirements and procedures for the examination of merchandise which are equally applicable in a CES context. In order to ensure consistency of context and better proximity as between related provisions, proposed Subpart C of Part 118 has been transferred in this document to Subpart A of Part 151 as one new section 151.15 (with paragraphs (a)–(d) thereof corresponding to proposed sections 118.21–118.24 respectively), and the following conforming changes to other regulatory provisions have been made as set forth below to reflect this transfer: (1) adding a sentence to section 118.0 (Scope) to clarify that the procedures governing the transfer of merchandise to a CES are set forth in Part 151; (2) renumbering proposed sections 118.31–118.34 as sections 118.21–118.24 and redesignating proposed Subpart D as Subpart C; (3) modifying the first sentence of section 151.6 to include a reference to examination required or authorized under section 151.15; and (4) modifying the first sentence of section 151.7 to include a reference to examination at a CES as provided in section 151.15. For ease of reference within this document, where submitted comments concern aspects of proposed sections 118.21–118.24 and result in changes to the proposed texts, the agreed changes are described in the relevant discussion as changes appearing in new section 151.15 as set forth in this document.

Customs agrees with the comment regarding clarification of the definition of a CES as a place not in the charge of a Customs officer, and the first sentence of section 118.1 as set forth below has been modified accordingly. In addition, the introductory text of section 151.15(b) as set forth below has been modified to expressly prohibit non-bonded transfers as one commenter suggested and to also improve the clarity of the text. Customs also agrees that a broker, if acting as importer of record, should be allowed to obligate his importation and entry bond for the transfer of cargo to a CES, and section 151.15(b)(4) as set forth below has been modified to clarify that liability is under the bond of the importer of record who may be the actual importer or an agent of the importer.

Customs does not agree with the suggestion regarding the need to set a specific minimum of $1 million liability insurance. Customs is of the view that a specific regulatory minimum level would be inappropriate because the necessary level would depend on the overall number and type of examinations performed within the port and at the particular CES facility.

Customs also disagrees with the suggestion that the operator's liability insurance should cover all damage to merchandise stored in the CES. Such insurance is intended to compensate the owner of merchandise for loss, theft, or damage occurring while the merchandise is in the operator's control and resulting from actions or negligence on the part of the operator or his employees. On the other hand, the CES operator should not be required to carry liability insurance to cover damage occurring

outside the operator's control as, for example, when Customs causes damage to merchandise in connection with an examination to determine whether contraband is concealed within that merchandise.

Customs does not agree that the CES operator should be made solely liable for any duties and taxes on lost or stolen merchandise. The CES operator's liability for duties and taxes exists only during the period when the merchandise is covered by the operator's custodial bond and not when the loss or theft occurs during coverage of the merchandise by another bond such as an importer's entry bond or a cartman's custodial bond.

Finally, Customs agrees that the "performance bond" reference in section 118.4(g) is confusing because it can only have reference to a Customs custodial bond covering the CES operation (which, under section 118.11(e), must be in existence when an applicant is selected as a CES operator). In order to address this point, section 118.4(g) as set forth below has been modified by removing from the first sentence the words "and further agrees to its application as a performance bond to the CES operation" which are redundant in this context. In this way a clear and proper relationship will exist between possession of a custodial bond for selection purposes as required by section 118.11 and continued maintenance of that bond during operation of the CES as required by section 118.4.

Comment:

A large number of comments was received on Subpart D (redesignated in this document as Subpart C as discussed above) relating to the immediate or proposed revocation of selection and cancellation of the agreement to operate a CES. Several commenters raised a number of procedural issues, arguing in favor of longer appeal periods, more extensive appeal rights, and specific provision for a formal hearing and for judicial review as is done in the regulations applicable to Customs bonded warehouses and licensed cartmen. Two commenters suggested that these regulations should not cover existing CESs. One commenter wanted clarification that a CFS operator also operating a CES would have revocation procedures concerning the CFS operation covered by the appropriate regulations in Part 19 of the Customs Regulations. One commenter believed it was unreasonable to propose revocation and cancellation for not following a single order of a Customs officer, and another commenter argued that immediate revocation and cancellation for commission of criminal acts should not be permitted in the absence of either an actual conviction or an admission by the alleged violator that the act occurred. One commenter suggested adding offering or giving a gratuity to a Customs officer as grounds for immediate revocation and cancellation. Another commenter suggested adding the following circumstances as grounds for proposed revocation and cancellation: (1) when a CES operator charges, or proposes to charge, excessive fees for services; and (2) when the CES committee requests the district director to take such action.

Customs response:

Customs does not agree with the proposals to extend the appeal time limits and to provide for formal hearings and for appeal rights beyond the level of the Commissioner of Customs. The appeal time limits are restricted in each case to a 10-day period because a longer period would be extremely disruptive to the cargo operation of any district due to the relatively small number of CESs in operation there. A more extended appeal procedure would have a detrimental effect on the delivery of cargo to many importers and would have a negative impact on the efficient use of Customs personnel by increasing Customs costs and reducing Customs ability to detect contraband.

With regard to the comments in favor of formal hearings and more extended appeal rights, Customs notes that there is a fundamental operational distinction between CESs and the bonded warehouses and licensed cartmen mentioned by the commenters: whereas use of a CES occurs only as a result of a case-by-case Customs determination to examine particular merchandise (and in some cases to use a particular CES), in the majority of cases use of a bonded warehouse or cartman occurs at the instigation of the importer or the importer's agent and without the initial involvement of Customs. Moreover, Customs is not required under the law to provide formal hearings or more extended appeal rights in connection with an administrative procedure such as a CES revocation and cancellation action. In light of these factors, and given the extensive due process protection reflected in the CES regulations, Customs does not believe that it is necessary to precisely track the procedures used for bonded warehouses and cartmen. Finally, it should be noted that the presence or absence of a specific reference to judicial appeal in the Customs Regulations has no legal effect on the right of a party to seek review of an administrative action in any court of competent jurisdiction.

Customs does not agree with the proposal to exempt existing CESs from these regulations. It would be inappropriate to treat two CES operations in a different manner when the purpose behind the revocation and cancellation procedure (to ensure that CESs are operated properly) clearly applies to all CES operations. Accordingly, Customs cannot accede to the enforcement loophole which this comment appears to suggest. On the other hand, and assuming that an existing CES otherwise operates in conformity with the regulatory requirements, Customs will honor any existing agreement as regards the duration of the CES operation and the security and other physical requirements needed at the CES.

A CFS operator continues to be subject to the provisions in Part 19 concerning suspension or revocation of the privilege to operate a CFS. The CES regulations do not supersede or otherwise affect the CFS regulations in this regard.

Customs believes that proposing revocation because a CES operator failed to follow a Customs order is reasonable because in the appeal process the operator will be given the opportunity to show, for example, that

he did comply with the order, that the order was not correctly communicated by Customs, or that the order was, in fact, improper.

Customs does not agree with the suggestion that immediate revocation and cancellation for a criminal act be limited to cases involving an actual conviction or admission. The only criminal offenses which will result in an immediate revocation and cancellation are those which involve theft, smuggling, or a theft-connected crime. These specific offenses were included in the regulation in question because they are of overriding concern to Customs given the threat that a perpetrator of such offenses could pose to a CES operation and to the merchandise under the control thereof. In view of the fact that significant procedural and other delays often occur in the criminal justice system before conviction or acquittal results and since admissions of guilt are comparatively rare, these special concerns militate strongly against basing an immediate revocation and cancellation only on an actual conviction or admission.

Customs does not believe that it is necessary or appropriate to list the giving or offering of a gratuity as one of the offenses which will be grounds for immediate revocation and cancellation. While bribery is a serious offense, it is usually committed in conjunction with smuggling or theft which are already grounds for immediate revocation and cancellation. Moreover, since the giving of a gratuity does not intrinsically involve a threat to the revenue or to the merchandise stored at a CES, Customs believes that if the gratuity is offered or given by an employee of the CES rather than by the operator himself, the CES operator should first be given an opportunity to demonstrate that he had no prior knowledge of, and involvement in, the improper action of his employee.

Customs does not agree that charging or proposing to charge excessive fees should be grounds for revocation and cancellation because (1) all fee schedules and changes thereto must be approved by the district director and (2) a failure to abide by the fees as approved by the district director is already a ground for revocation and cancellation. Finally, in view of the decision not to employ the CES committee concept as discussed above, the suggested ground for proposed revocation and cancellation based on a request made by a CES committee has become moot.

Comment:

A number of commenters made the following suggestions regarding the fees charged by a CES operator: that any proposed fee changes be reviewed by a CES committee; that Customs audit operator's records; that each CES applicant include a detailed operating budget, including profit margin, in the application; that a new user fee be assessed on all importers, or that the existing merchandise processing fee (MPF) be used, to cover examination costs in place of the CES operator fees; that the notice period for proposed fee changes in section 118.4(c) be shortened from 90 days to 30 days; that section 118.4(c) be amended to refer to "reasonable" service fees; and that the regulations be amended to define reasonable fees as fees which are "comparable to fees for similar

services in the community", as was stated in regard to the selection process outlined in the Directive implementing the CES program.

Customs response:

Before responding to the above comments, two issues regarding changes to approved fee schedules must be discussed and resolved.

The first issue is both organizational and procedural in nature, and in this regard Customs notes that whereas the first sentence of proposed section 118.4(c) requires that fees be assessed as outlined in the fee schedule included in the approved application, the remaining sentences thereof concern the procedures for subsequent changes to an approved fee schedule. On further reflection, Customs does not believe it is appropriate to include fee change procedures within section 118.4 which is only intended to outline the basic responsibilities of a CES operator and thus more properly in paragraph (c) should only cover the responsibility to abide by the approved fee schedule (including any subsequent changes thereto). Accordingly, this document incorporates the following changes: (1) a new section 118.5 has been added to cover procedures for changes to a fee schedule; and (2) paragraph (c) of section 118.4 has been modified to reflect only the first sentence of the paragraph as proposed and with the addition of a reference to fee changes approved under section 118.5. Consistent with the principle of allowing input from the public during the decision-making process without utilizing the CES committee concept as discussed above in connection with the CES operator application process, new section 118.5 as set forth below provides for (1) publication of a notice of the proposed fee schedule changes with solicitation of comments from the general public, with a cross-reference to section 118.2 as regards the procedures for dissemination of the notice and for submission of the public comments, and (2) publication of a notice of the new fee schedule if the proposed changes are approved by the district director. In addition, new section 118.5 refers to the intention of a CES operator to "increase, add to or otherwise change" the service fees (in order to clarify that the section applies to any change to the fee schedule, including an increase of an existing fee amount, the addition of a new fee, or the reduction or elimination of an existing fee), requires written justification also for the addition of a new fee (which is akin to a fee increase for which written justification was specified in proposed section 118.4(c)), and provides for written notice to the CES operator of the district director's decision on the proposed fee change.

The second issue concerns the relationship between the obligation of a CES operator to abide by a changed fee schedule and the sanctions that may be imposed if the operator fails to do so. It is noted in this regard that whereas proposed section 118.31(b)(1) (renumbered in this document as 118.21(b)(1) as discussed above) provided that the district director may propose revocation and cancellation if the CES operator "* * * fails to operate in accordance with the terms of his agreement", a changed fee schedule in effect replaces the fee schedule approved as part of the CES operator application process but does not become part of the

agreement itself. Thus a potential anomaly could arise whereby sanctions could be taken for failure to follow the original fee schedule but not for failure to follow a changed one. In order to avoid such an unintended and inappropriate result, section 118.21(b)(1) as set forth below has been modified by adding at the end a general reference to section 118.4 so that the obligation to follow a changed fee schedule (as provided in modified section 118.4(c) discussed above) will be treated the same as the obligation to follow an original fee schedule for purposes of a proposed revocation and cancellation action.

Customs does not agree with those commenters who argued that Customs should audit an operator's records and that each applicant should provide a detailed operating budget including profit margin. Neither an applicant's operating budget nor a CES operator's general business records are matters over which Customs should exercise direct control or oversight by audit or otherwise. Although Customs is directly concerned with the nature of the fees charged (as further discussed below) and the manner in which the operator makes merchandise available for examination and thus may have occasion to look into complaints affecting those areas, Customs has no intention of routinely auditing or otherwise controlling each and every aspect of a CES operation.

Customs lacks the authority to impose a new user fee in this situation. As regards use of the present MPF in place of CES operator fees, Customs does not agree with this suggestion for two related reasons: (1) contrary to the case of the MPF, CES fees are not paid to Customs for services provided by Customs to the importer (rather, they are paid to the CES operator for services provided by that operator to the importer); and (2) CES fees cover, among other things, the maintenance and operating costs of the CES and thus they do not relate to Customs costs for examining the merchandise (which, in terms of salary and expenses of the Customs inspector performing the examination, would normally be covered by the MPF). Customs further notes that under a longstanding principle established in an opinion of the Attorney General (35 O.A.G. 431 (1928)) and reflected in sections 151.6 and 151.7 of the Customs Regulations, the expenses incurred in making merchandise available to Customs for purposes of examination are to be borne by the importer rather than by Customs (except when the examination takes place at the public stores); this principle was reaffirmed in T.D. 84–152 (49 FR 29372) which amended sections 151.6 and 151.7 to limit the use of public stores as places for the examination of merchandise. The legal responsibility of importers to cover expenses in connection with the examination of merchandise is based on legal authority totally separate from the user fee statute (19 U.S.C. 58c), and the importer's payment of a fee to a CES operator for his services is nothing more than an alternative means for the importer to carry out that legal responsibility.

Customs does not agree with the suggestion that the notice period regarding a proposed fee schedule change be reduced from 90 to 30 days. In view of the changes to the regulatory texts to provide public notice and

comment procedures on fee schedule changes (which will include a 30-day public comment period under new section 118.5 and modified section 118.2) as discussed above, the 90-day period must be retained in order to ensure sufficient time for all required procedures.

As regards the comment that section 118.4(c) should refer to "reasonable" service fees, Customs agrees that some type of standard should apply to fees charged by a CES operator because the limited number of CESs established in a given area could otherwise give rise to monopolistic fee levels. However, Customs does not believe that a mere reference to "reasonable" fees would be useful because this would impose a requirement without providing any meaningful definition or standard. The better approach, as suggested by one of the commenters, would be to refer to fees that are "comparable to fees for similar services" in the area in which the CES is located, and Customs believes that the appropriate place for such a standard would be section 118.11(c) (rather than section 118.4(c)) so that the standard is properly applied at the very beginning in connection with the application approval process. Accordingly, section 118.11(c) as set forth below has been modified to refer to service fees comparable to fees for similar services in the area to be served by the CES, but with the qualification that this comparability requirement may be affected by special costs borne by the applicant such as facility modifications to meet specific cargo handling or storage requirements or Customs security needs. However, it should be noted that since the fee schedule is one of the criteria used to judge an application, proposing a higher-than-normal fee schedule in order to recover such costs could have an adverse effect on an applicant's candidacy (particularly if another otherwise equal applicant does not have to modify his facility and thus proposes a lower fee schedule). Finally, a reference to this principle of comparability has been included in section 118.5 to ensure consistency in the context of fee schedule changes.

Comment:

Several commenters stated that the regulatory criteria for selection were too general. In this regard, they recommended providing specific standards concerning location and physical and security requirements (for example, maximum distance from the unlading facility, minimum square footage, number of bay doors, alarm system, sprinkler system) and concerning required experience or training for CES employees, with these specific criteria to be supplemented as necessary by any special local criteria set forth in the notice to the public in connection with the application process.

Customs response:

Customs does not agree that such detailed standards should be included in the regulations because operational and physical requirements too often vary from one CES to another even within the same district or port of entry. For example, the operation of an airport CES where much cargo is loose or on pallets (and thus more easily examined)

is different from a seaport CES where most cargo is containerized. Moreover, as compared to CESs in large seaports, CESs at land border points and at inland ports often handle less varied types of cargo and have lower examination volumes and thus often have to meet less stringent requirements regarding floor space, bay doors, machinery or handling equipment and other physical factors. Accordingly, in order to retain sufficient flexibility to meet local needs, Customs believes that specific criteria are inappropriate for the regulations but rather should be applied on a case-by-case basis by setting them out in connection with the notice by the district director that applications to operate a CES are being accepted.

Comment:

Two commenters recommended language prohibiting any CES operations at airports.

Customs response:

The need for a CES is based on two principal factors: the cargo activity in a port of entry and the demands placed on the Customs resources needed to examine that cargo so as to ensure compliance with the law. Thus, the regulations neither mandate nor preclude CES operations based on the particular type of location because the central issue in establishing a CES is the workload level in the area to be serviced by the CES. If cargo activity increases significantly at an airport (particularly in terms of the number of cargo receivers) so as to put a strain on Customs examination resources, it would be in the interest of both Customs and importers to establish a CES. Accordingly, Customs believes it would be inconsistent with the purpose of the CES program to exclude airports as CES locations.

Comment:

One commenter suggested requiring applicants to commit to participation in the Automated Manifest System (AMS).

Customs response:

Customs does not believe it would be appropriate to impose such a requirement because at this time there is no provision for CES participation as a receiver or transmitter of information through AMS.

Comment:

One commenter suggested listing types of cargo that cannot be sent to a CES.

Customs response:

Customs notes that certain types of merchandise (for example, heavy machinery) probably could not be transported to or handled at a CES and that other types of merchandise (for example, explosives and other dangerous products) would rarely, if ever, be designated for examination at a CES. However, Customs does not believe that it would be appropriate to include such an exclusionary list in the regulations because

there will also be cases in which a special cargo (for example, frozen fish) could be handled at one CES but not at another. Since Customs makes the determination as to whether merchandise is to be sent to a CES for examination, it would be preferable to deal with such issues on a case-by-case basis so that, when special types of merchandise require examination, arrangements can be made to perform the examination at the best suited location.

Comment:

Several commenters argued that the cargo owner or broker, and not the district director, should designate the CES to which merchandise is to be sent.

Customs response:

Although under section 151.15(a) as set forth below the entry filer normally designates the CES to be used, the district director has authority under section 151.15(d) to override the entry filer's designation, consistent with the authority of a Customs officer to designate the place of examination under 19 U.S.C. 1499. Customs believes that the authority reflected in section 151.15(d) should be retained because (1) as previously noted, Customs controls the entire process starting with the decision to examine the merchandise, (2) Customs must ensure that the CES is compatible with the type of merchandise to be examined, and (3) the availability of Customs officers at a particular CES at a particular time may affect the selection of the CES to be used.

Comment:

One commenter said that section 118.22 (section 151.15(b) as set forth below) should state exactly how the importer or broker selects the specific movement method among the four methods listed.

Customs response:

Customs does not agree that section 151.15(b) should be modified as suggested, because the movement method and resulting custodial bond liability is more properly a private, nonregulatory matter that should be resolved among the affected parties (importing carrier, importer, broker, bonded carrier, CES operator).

Comment:

One commenter suggested adding language stating that the CES operator will make every effort to reload a container and will notify the carrier if he cannot. Another commenter stated that the principle of an "appointed" examination time should be added to section 118.4(b) (which only refers to service provided on a "first come–first served" basis) to reflect the fact that Customs often sends a particular cargo specialist to a CES to examine specific merchandise at a prearranged time.

Customs response:

Since under the basic CES operating principle the CES operator renders services on behalf of the importer rather than for the benefit of the carrier, Customs cannot require in the regulations that the CES opera-

tor provide notice of reloading problems to the carrier; however, there is nothing to prevent a CES operator and a carrier from making their own private arrangements in this regard. As regards an appointed time for an examination, this procedure is not generally used in the case of CESs and therefore section 118.4(b) should not be modified as suggested.

Comment:

The Food and Drug Administration (FDA) recommended adding general references to "other government agencies" or "other government agency personnel" to various regulatory provisions regarding office space availability, making merchandise available for inspection, selection of a CES operator who will best meet examination needs, and authority to order merchandise to a CES and to designate the CES to be used.

Customs response:

Customs agrees in principle that, as a general rule, it is desirable for other government agencies to examine merchandise at a CES because it will generally save time and money for the importer to have all interested agencies examine his goods at one place. However, Customs does not believe that the suggested regulatory changes should be made at this time because publication of specific proposals by Customs and the other interested agencies, with opportunity for public comment, would be necessary before such substantive changes could be implemented. Customs will, of course, continue to coordinate with other government agencies to the greatest extent possible in arranging examinations at CESs to ensure compliance with laws administered by those agencies.

Comment:

One commenter questioned the propriety of these regulations based on the argument that the CES selection process is actually a contracting process subject to Federal procurement regulatory procedures.

Customs response:

Customs does not agree. The CES selection process does not involve a procurement (that is, a purchase and sale) between Customs and the CES operator and thus there is no contract within the meaning of the Federal procurement regulations.

Comment:

One commenter recommended (1) amending section 118.11(f) to require that a CES applicant identify in the employee list any employee known to have had a felony conviction and (2) amending section 118.4(f) to require that a CES operator provide the same information as part of keeping the list of employees current, similar to what is required of Customs brokers in section 111.53(e) of the Customs Regulations. This commenter also stated that providing an employee's social security number should be mandatory as is the case with Customs brokers.

Customs response:

Customs does not agree that the regulations should require that an applicant identify, or that an operator update the employee list regarding, any employee known to have had a felony conviction. Customs notes in this regard that the commenter's reliance on section 111.53(e) of the broker regulations in the present context is misplaced for the following reasons: (1) the cited broker regulation is based directly on a statutory provision (19 U.S.C. 1641(d)(1)(E)); (2) the broker statutory/regulatory provision is a ground for disciplinary proceedings (for knowingly employing a felon) but is *not* a substantive reporting requirement; and (3) the sensitivity issue as regards employment of a felon is clearer in the case of brokers because not all aspects of a broker's business are covered by a Customs bond and liability insurance. As concerns the voluntary providing of social security numbers, Customs notes that section 118.11(f) conforms to the requirements of the Privacy Act of 1974 (5 U.S.C. 552a) in this regard.

ADDITIONAL CHANGES TO THE PROPOSED REGULATORY TEXTS

In addition to the changes discussed above in connection with the comment analysis, the regulatory texts as set forth below incorporate further editorial or other non-substantive changes to the proposed regulations in order to improve the clarity, readability or organization of the texts. The following principal changes are noted in this regard:

Section 118.3:

The second sentence has been changed to state that failure to execute the agreement "may result in" tentative selection of another applicant "or republication of the notice soliciting applications", to clarify that certain circumstances (for example, the absence of another suitable applicant) may make another selection impracticable at that time.

Section 118.4:

The introductory text has been changed by adding a reference to "commencing operation" of a CES, because certain requirements set forth in the section (for example, abiding by a fee schedule change adopted under section 118.5) may not be directly reflected in the agreement. In addition, paragraph (h) has been reworded and rearranged to clarify that record retention and availability to Customs both have reference to the basic provisions contained in Part 162.

Section 118.11:

Paragraph (e) has been modified to clarify that where Customs Form 301 is submitted for approval with the application, approval of the custodial bond is a prerequisite to selection.

Section 118.21:

In paragraph (a), the introductory text has been changed to state that the district director "shall" immediately revoke the selection and cancel the agreement, to more clearly reflect the mandatory nature of the pro-

vision. In addition, in paragraph (a)(2) the second sentence has been redrafted for clarity.

Sections 118.22–118.24:

These sections have been modified to more clearly distinguish between an immediate action and a proposed action, to refer to a "notice" of the action in each case, and to simplify the references to a written decision on an appeal. In addition, in section 118.23, the second sentence has been amplified to clarify that a proposed revocation and cancellation does not take effect until the administrative appeal process has been concluded with a decision adverse to the operator.

Section 151.15:

Paragraph (a) has been modified by adding a qualification at the end to reflect the authority of the district director under paragraph (d) to designate the CES to be used, and a qualification has similarly been added at the end of the introductory text of paragraph (b) as regards the district director's authority under paragraph (d) to specify the bonded movement to be used; in addition, in order to ensure a proper record of either action by the district director, paragraph (d) has been modified to provide for notation of the action on the Customs Form 3461 or 3461 (ALT) or attachment thereto. Finally, paragraphs (b)(1)–(4) have been modified to refer to the specific bond and the nature of the bond obligation involved, paragraph (b)(2) has been further modified by removing the unnecessary qualifier "formally" before "receipted", and paragraph (b)(4) has been further modified to refer to an importer or agent who "transfers" the merchandise to the CES (to clarify that the bond liability relates to the party who performs the transfer) and to refer at the end to receipt by the CES operator as is done in paragraphs (b)(1) and (2).

Conclusion

Accordingly, based on the comments received and the analysis of those comments as set forth above, Customs believes that the proposed centralized examination station regulations should be adopted as a final rule with certain changes thereto as discussed above. In addition, Part 178 of the Customs Regulations (19 CFR Part 178) is being amended to indicate the OMB-assigned control number for the information collection contained in this final rule.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the regulations will not have a significant economic impact on a substantial number of small entities. Importers are required under present law to bear the costs incurred in making im-

ported merchandise available to Customs for examination, and the regulations, by streamlining examination procedures, should reduce those costs and improve the overall importation/entry process. Accordingly, the regulations are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

PAPERWORK REDUCTION ACT

The collection of information in these final regulations, contained in section 118.11, has been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507(h)) under control number 1515–0183. The estimated average annual burden associated with this collection is 2 hours per respondent or recordkeeper. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the U.S. Customs Service, Paperwork Management Branch, Room 6316, 1301 Constitution Avenue N.W., Washington, D.C. 20229, or the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 118

Customs duties and inspection, Imports, Centralized examination stations.

19 CFR Part 151

Customs duties and inspection, Imports, Examination, sampling and testing.

19 CFR Part 178

Reporting and recordkeeping requirements, Paperwork requirements, Collections of information.

AMENDMENTS TO THE REGULATIONS

For the reasons set forth above, Chapter I of Title 19, Code of Federal Regulations (19 CFR Chapter I), is amended by adding Part 118 and amending Parts 151 and 178 as set forth below.

PART 118 – CENTRALIZED EXAMINATION STATIONS

Sec.

SUBPART A – GENERAL PROVISIONS

Sec.

SUBPART A—GENERAL PROVISIONS—continued

SUBPART B—APPLICATION TO ESTABLISH A CES

SUBPART C—TERMINATION OF A CES

Authority: 19 U.S.C. 66, 1499, 1623, 1624.

§ 118.0 Scope.

This part sets forth regulations providing for the making of agreements between Customs and persons desiring to operate a centralized examination station (CES). It covers the application process, the responsibilities of the person or entity selected to be a CES operator, the CES operator's agreement, the grounds and procedures for revoking a selection and cancelling an agreement, and the procedures for challenging a revocation and cancellation action. Procedures and requirements for the transfer of merchandise to a CES are set forth in part 151 of this chapter.

SUBPART A—GENERAL PROVISIONS

§ 118.1 Definition.

A centralized examination station (CES) is a privately operated facility, not in the charge of a Customs officer, at which imported merchandise is made available to Customs officers for physical examination. A CES may be established in any port or any portion of a port, or any other area under the jurisdiction of a district director.

§ 118.2 Establishment of a CES.

When a district director makes a preliminary determination that a new CES should be established, or when the term of an existing CES is about to expire and the district director believes that the need for a CES still exists, he will announce, by written notice posted at the customhouse and by any other written methods he may consider appropriate (such as normal district information distribution channels, trade bulletins or local newspapers), that applications to operate a CES are being accepted. This notice will include the general criteria together with any local criteria that applicants must meet (see § 118.11 of this part) and will invite the public to submit any relevant written comments on whether a new CES should be established or on whether there is still a need for a CES. Applications will be accepted only in response to the dis-

trict notice and must be received within 60 calendar days from the date of the notice. Public comments must be received within 30 calendar days from the date of the notice.

§ 118.3 Written agreement.

The applicant tentatively selected to operate a CES must sign a written agreement with Customs before commencing operations. Failure to execute a written agreement with Customs in a timely manner will result in the revocation of that applicant's tentative selection and may result in tentative selection of another applicant or republication of the notice soliciting applications. In addition to the provisions described elsewhere in this part, the agreement will specify the duration of the authority to operate the CES. That duration will be not less than three years nor more than six years. Such agreements cannot be transferred, sold, inherited, or conveyed in any manner. At the expiration of the agreement, an operator wishing to reapply may do so pursuant to this part and his application will be considered de novo.

§ 118.4 Responsibilities of a CES Operator.

By signing the agreement and commencing operation of a CES, an operator agrees to:

(a) Maintain the facility designated as the CES in conformity with the security standards as outlined in the approved application;

(b) Provide adequate personnel and equipment to ensure reliable service for the opening, presentation for inspection, and closing of all types of cargo designated for examination by Customs. Such service must be provided on a "first come–first served" basis;

(c) Assess service fees as outlined in the fee schedule included in the approved application or as changed under § 118.5 of this part and bill users directly for services rendered;

(d) Assume responsibility for any charges or expenses incurred in connection with the operation of the CES;

(e) Maintain, at his own expense, adequate liability insurance with respect to the property within his control and with respect to persons having access to the CES;

(f) Keep current the list filed with the district director pursuant to § 118.11(f) of this part. Additions to or deletions from the list must be submitted in writing to the district director within 10 calendar days of the commencement or termination of employment;

(g) Maintain a Customs custodial bond in an amount set by the district director. The operator also agrees to increase the amount of the bond if deemed appropriate by the district director;

(h) Maintain and make available for Customs examination all records connected with the operation of the CES in accordance with part 162 of this chapter and retain such records for a period of not less than five years from the date of the transaction or examination conducted pursuant to the agreement to operate the CES;

(i) Submit, if requested by Customs, the fingerprints of all employees involved in the CES operation;

(j) Provide office space, parking spaces, appropriate sanitary facilities, and potable water to Customs personnel at no charge or a charge of $1 per year; and

(k) Perform in accordance with any other reasonable requirements imposed by the district director.

§ 118.5 Procedures for changes to a fee schedule.

Whenever a CES operator intends to increase, add to or otherwise change the service fees set forth in the fee schedule referred to in § 118.4(c) of this part, the operator shall provide 90 calendar days advance written notice to the district director of such proposed fee schedule change and shall include in the notice a justification for any increased or additional fee. Following receipt of this written notice, the district director will advise the public of the proposed fee schedule change and invite comments thereon under the public notice and comment procedures set forth in § 118.2 of this part. After a review of the proposed fee schedule change and any public comments thereon, and based on the principle of comparability set forth in § 118.11(c) of this part, the district director will decide whether to approve the change, will notify the CES operator in writing of his decision, and will notify the public of any approved fee schedule change by the same methods that were used to provide the public with notice of the proposed change. A CES operator shall remain bound by the existing fee schedule and shall not implement any fee schedule change prior to receipt of written approval of the change from the district director.

SUBPART B—APPLICATION TO ESTABLISH A CES

§ 118.11 Contents of application.

Each application to operate a CES shall consist of the following information, any application not providing all of the specified information will not be considered, and the responses to paragraphs (b), (c), (d), (g) and (h) shall constitute the criteria used to judge the application:

(a) The name and address of the facility to be operated as the CES, the names of all principals or corporate officers, and the name and telephone number of an individual to be contacted for further information;

(b) A description of the CES's accessibility within the port or other location, and a floor plan of the facility actually dedicated to the CES operation showing bay doors, office space, exterior features, security features, and staging and work space. Where a significant capital expenditure would be required in order for an existing facility to meet security or other physical or equipment requirements necessary for the CES operation, the applicant may request in the application, and the district director may allow, up to an additional 30 calendar days after tentative selection to conform the facility to such requirements, but in such a case the agreement referred to in § 118.3 of this part shall not be executed until those requirements are met;

(c) A schedule of fees clearly showing what the applicant will charge for each type of service. Subject to any special costs incurred by the applicant such as facility modifications to meet specific cargo handling or storage requirements or to meet Customs security standards, the fees set forth in the schedule shall be comparable to fees charged for similar services in the area to be served by the CES;

(d) A detailed list of equipment showing that the applicant can make a diverse variety of cargo available for examination in an efficient and timely manner;

(e) A copy of an approved custodial bond on Customs Form 301. If the applicant does not possess such a bond, a completed Customs Form 301 must be included with the application for approval as a prerequisite to selection;

(f) A list of all employees involved in the CES operation setting forth their names, dates of birth, and social security numbers. (Providing social security numbers is voluntary; however, failure to provide the number may hinder the investigation process.);

(g) Any information showing the applicant's experience in international cargo operations and knowledge of Customs procedures and regulations, or a commitment to acquire that knowledge; and

(h) Any other information to address any local criteria that the district director considers essential to the selection process based on port conditions.

§ 118.12 Action on application.

Following submission of all applications in accordance with §§ 118.2 and 118.11 of this part, the district director will advise the public of the applications received and invite comments thereon under the public notice and comment procedures set forth in § 118.2; with regard to each application, the notice will set forth the name of the applicant, the address of the facility proposed to be operated as the CES, the proposed fee schedule, the list of equipment at the facility, and the number of employees to be involved in the CES operation. The district director, based on a review of all applications under the criteria set forth in § 118.11 and any public comments submitted under § 118.2 or this section, shall determine whether a CES operator should be selected and, if a CES operator is to be selected, shall select the applicant that will best meet the examination needs of Customs and facilitate the movement of imported merchandise.

§ 118.13 Notification of selection or nonselection.

The applicant selected to operate a CES will be notified in writing by the district director of his tentative selection. The selection shall become final upon execution of the written agreement between Customs and the applicant under § 118.3 of this part, and the district director will advise the public of the final selection and of the date on which the CES will commence operation under the agreement in accordance with the notice procedures set forth in § 118.2 of this part. Each applicant not selected

to be a CES operator will be so notified in writing and with a statement of the reason for nonselection.

SUBPART C—TERMINATION OF A CES

§ 118.21 Revocation of selection and cancellation of agreement to operate a CES.

(a) *Immediate revocation and cancellation.* The district director shall immediately revoke a selection as operator and cancel an agreement to operate a CES if:

(1) The selection and agreement were obtained through fraud or the misstatement of a material fact; or

(2) The CES operator or an officer of a corporation which is a CES operator is convicted of, or has committed acts which would constitute, a felony or a misdemeanor involving theft, smuggling, or a theft-connected crime, and the conviction resulted from, or the subject acts were in fact committed as part of, his official duties as operator or corporate officer. Any change in the employment status of a corporate officer (for example, discharge, resignation, demotion, or promotion) prior to his conviction for a felony or misdemeanor involving theft, smuggling, or a theft-connected crime will not preclude application of this paragraph if the conviction resulted from an act or acts committed in his official capacity as corporate officer.

(b) *Proposed revocation and cancellation.* The district director may propose to revoke the selection as operator and cancel the agreement to operate a CES if:

(1) The CES operator refuses or otherwise fails to follow any proper order of a Customs officer or any Customs order, rule, or regulation relative to the operation of a CES, or fails to operate in accordance with the terms of his agreement or the provisions of § 118.4 of this part;

(2) The CES operator fails to retain merchandise which has been designated for examination;

(3) The CES operator does not provide secure facilities or properly safeguard merchandise within the CES;

(4) The CES operator fails to furnish a current list of names, addresses and other information required by § 118.4 of this part; or

(5) The custodial bond required by § 118.4 of this part is determined to be insufficient in amount or lacking sufficient sureties, and a satisfactory new bond with good and sufficient sureties is not furnished within a reasonable time.

§ 118.22 Notice of revocation and cancellation.

The district director shall immediately revoke the selection as operator and cancel the agreement to operate a CES, or propose to revoke such selection and cancel such agreement, by serving notice in writing on the operator. The notice shall be in the form of a statement specifically setting forth the grounds for immediate revocation and cancellation or proposed revocation and cancellation and shall inform the operator of his right to appeal.

§ 118.23 Appeal procedure.

An operator wishing to appeal an immediate revocation and cancellation or to show cause why a proposed revocation and cancellation should not occur may, within 10 calendar days of receipt of the written notice of the immediate or proposed action, file a written appeal with the Regional Commissioner having jurisdiction over the district director who signed the notice. A revocation and cancellation pursuant to § 118.21(a) of this part shall remain in effect during any appeal, but a revocation and cancellation pursuant to § 118.21(b) of this part shall not take effect until the appeal process under this paragraph and under § 118.24 of this part has been concluded with a decision adverse to the operator. The appeal shall be filed in duplicate and shall set forth the response of the CES operator to the statements of the district director. The Regional Commissioner shall render a written decision to the operator, stating the reasons for the decision, by letter mailed within 30 working days following receipt of the appeal unless the period for decision is extended with due notification to the operator.

§ 118.24 Appeal from the Regional Commissioner's decision.

Upon a decision by the Regional Commissioner affirming the immediate revocation of selection and cancellation of an agreement to operate a CES or agreeing that a proposed revocation and cancellation should take effect, the operator may file with the Commissioner of Customs a written appeal requesting such additional review as the Commissioner or his delegate deems appropriate. This request must be received by the Commissioner within 10 calendar days of the operator's receipt of the Regional Commissioner's decision. The Commissioner or his delegate shall render a written decision to the operator, stating the reasons for the decision, by letter mailed within 30 working days following receipt of the appeal unless the period for decision is extended with due notification to the operator.

PART 151 – EXAMINATION, SAMPLING, AND TESTING OF MERCHANDISE

1. The authority citation for Part 151 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1202 (General Notes 8 and 9, Harmonized Tariff Schedule of the United States), 1624. Subpart A also issued under 19 U.S.C. 1499. * * *

* * * * * * *

2. Section 151.6 is amended by revising the first sentence to read as follows:

§ 151.6 Place of examination.

All merchandise will be examined at the place of arrival, unless examination at another place is required or authorized by the district director in accordance with § 151.7 or § 151.15 of this part. * * *

3. Section 151.7, introductory text, is amended by revising the first sentence to read as follows:

§ 151.7 Examination elsewhere than at place of arrival or public stores.

The district director may require or authorize examination at a place other than the place of arrival or the public stores, such as at the importer's premises or at a centralized examination station under § 151.15 of this part. * * *

* * * * * * *

4. Section 151.15 is added to read as follows:

§ 151.15 Movement of merchandise to a centralized examination station.

(a) *Permission to transfer merchandise for examination.* When a shipment requires examination at a centralized examination station (CES), Customs Form 3461, or Customs Form 3461 (ALT) for land border cargo, or an attachment to either, may be used to request permission to transfer the merchandise to a CES. The entry filer must write, type or stamp the following lines on the form or attachment, and must supply the information called for on the first three lines:

Containers to be transferred: _____ All or,

Container #'s _____, _____, _____.

To CES _____.

Approved by: U.S. Customs Inspector _____.

Date _____.

Unless the district director exercises his authority pursuant to paragraph (d) of this section, the reviewing inspector will initial and date the form or attachment being used, or stamp one copy of the Customs Form 3461 or 3461 (ALT) if required by the district director. A copy of this document will act as notification and authorization to the entry filer that the merchandise must be transferred to the importer-designated CES unless another CES is designated by the district director under paragraph (d) of this section.

(b) *Assumption of liability during transfer.* Merchandise designated for examination may be transferred from the importing carrier's point of unlading or from a bonded facility, to a CES, only if the transfer takes place under bond. The entry filer shall select one of the following bonded movements for the transfer to the CES unless the type of bonded movement to be used is specified by the district director under paragraph (d) of this section:

(1) If the merchandise is transferred directly to a CES by an importing carrier, the importing carrier shall remain liable under the terms of its

international carrier bond for the proper safekeeping and delivery of the merchandise until it is receipted for by the CES operator.

(2) If the merchandise is transferred directly from a bonded carrier's facility to a CES or is delivered directly to the CES by a bonded carrier, the bonded carrier shall remain liable under the terms of its custodial bond for the proper safekeeping and delivery of the merchandise until it is receipted for by the CES operator.

(3) If containerized cargo, including excess loose cargo that is part of the containerized cargo, is transferred to a CES operator's own facility using his own vehicles, the CES operator shall be liable under the terms of his custodial bond for the proper safekeeping and delivery of the merchandise to the CES facility.

(4) If the importer or his agent acting as importer of record transfers the merchandise to a CES, that importer or agent shall assume liability under his importation and entry bond (see § 151.7(d) of this part) for the proper transfer of the merchandise until it is receipted for by the CES operator.

(c) *Annual blanket transfer.* District directors may institute an annual blanket transfer application procedure to facilitate any of the bonded movements described in paragraph (b) of this section.

(d) *Designation of bonded movement and CES to be used.* In the event the district director deems it necessary, he may direct the type of bonded movement to be used to transfer merchandise to a CES and may designate the CES at which examination must take place. In either case the district director's action will be noted on the Customs Form 3461 or 3461 (ALT) or attachment thereto.

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 1624, 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by inserting the following in the appropriate numerical sequence according to the section number under the column indicated:

19 CFR Section	Description	OMB control no.
§ 118.11	Application to establish a centralized examination station.	1515–0183

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: December 18, 1992.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, January 22, 1993 (58 FR 5596)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 113

AUTOMATED SURETY INTERFACE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule; solicitation of comments.

SUMMARY: This document proposes to amend the Customs Regulations to provide for an automated system, the Automated Surety Interface (ASI), through which participating sureties will electronically provide to Customs acknowledgment that they are liable for transactions identified under their bonds. Through ASI, Customs will be able to systemically establish and verify that a surety has recognized its bond liability under an identified bond and participating sureties will be provided certain capabilities to obtain timely information regarding the status of individual transactions for which they have a recognized liability. ASI will effectively increase the integrity of Customs bond liability recordkeeping and improve Customs ability to receive timely and immediate satisfaction of reported outstanding indebtedness. The creation of ASI reflects Customs significant advances in automation and its continuing commitment to increase the scope of electronic processing and to reduce reliance on paper documentation, thereby resulting in lowered costs, and increased efficiency.

DATES: Comments must be received on or before March 23, 1993.

ADDRESSES: Comments (preferably in triplicate) may be addressed to the Regulations Branch, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue, N.W., Washington, D.C. 20229 and inspected at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Diane Hundertmark, Office of Automated Commercial Systems (202–927–0355).

SUPPLEMENTARY INFORMATION:

Background

Generally, most bonds are issued by brokers who are designated as agents of sureties. Therefore, many times a corporate surety is unaware that it is liable on a particular entry for a particular importer. In these situations, when Customs bills a corporate surety for payment on a bond, the surety, to verify its liability, frequently requests copies of the bond and entry documents from Customs. Also, in some instances, it is

discovered that what was thought to be the obligation of one corporate surety is in fact the obligation of a different corporate surety. These situations cause significant delays in Customs receiving payment of the outstanding liabilities.

To resolve this critical problem, Customs is developing as part of its Automated Commercial System (ACS) a module, the Automated Surety Interface (ASI), which will allow Customs to systemically establish and verify that a participating surety has previously acknowledged liability under the identified bond and will provide the participating sureties with a method to regularly obtain timely information regarding the status of individual transactions for which they have a recognized liability. ASI will protect the revenue by securing recognition by sureties of their established bond liability.

Additionally, the establishment of this automated environment should place Customs in a position to eliminate the need for submission of paper documents once enabling legislation is passed.

How ASI Works

Single Entry Bonds:

Brokers and importers who are participants in the Automated Broker Interface (ABI) will transmit entry and bond identifying information to Customs for single entry bonds prior to the release of cargo pursuant to procedures set forth in § 143.31 *et seq.*, Customs Regulations (19 CFR 143.31 *et seq.*) and Customs Publication No. 552, "CATAIR". If the entry and bond identifying information is found to be error-free, a single entry bond record associated with a particular entry will be created in ACS. This record would contain all information including any changes and the responses from the ASI surety.

Customs will submit the transmitted entry and bond identifying information or, in the case of non-ABI transactions, that information input by Customs, electronically through the interface to the appropriate ASI surety for verification. An affirmative or negative response will be required from the ASI surety within a maximum of 15 minutes from the time the request for verification of the entry and bond identifying information was made available. If the entry and bond identifying information is not verified or no response is received from the ASI surety within the 15 minutes time frame, an appropriate message will be sent to the entry filer. The verification of the single entry bond by the ASI surety will become the key for all ACS processing. If there is a negative response or no response from the ASI surety, the cargo will not be released until such time as a bond (single entry or continuous) can be produced to satisfy Customs bonding requirements.

The single entry bond information provided by either the ABI filer or Customs input at entry/cargo release will be compared to the bond information provided at entry summary. If the single entry bond information has changed, a new verification would be required from the ASI surety involved.

Continuous Bonds:

Currently, continuous bonds are filed with Customs along with a letter of application pursuant to § 113.12(b). Under the procedure proposed in this document, this practice will continue; applications will be transmitted whenever continuous bonds are transmitted.

Brokers and importers who are participants in the Automated Broker Interface (ABI) and sureties who are participating in the Automated Surety Interface (ASI) will be able to transmit applications for continuous bonds and continuous bonds, make changes and updates and notify Customs of their request for termination of continuous bonds electronically through the interface pursuant to procedures set forth in the Customs Regulations and Customs Publication No. 552, "CATAIR".

When continuous bond and application information is transmitted to Customs by an ABI filer or, as in the case of non-ABI transactions, is input by Customs, Customs will transmit to the appropriate ASI surety certain information, as identified in Customs Publication No. 552, with a request for verification from the surety that the surety is accepting liability under that continuous bond. The ASI surety must electronically respond to Customs with an affirmative response before the continuous bond will be approved by Customs.

If the surety transmits an acceptance of liability, Customs will notify the ABI filer by electronic message of approval or rejection of the bond pursuant to § 113.92, Customs Regulations. If no response is received or a negative response is received from the surety, Customs shall provide an appropriate electronic message to the ABI filer.

If the continuous bond/application information is transmitted by the ASI surety, Customs automatically considers the bond verified. Customs would then provide an electronic message of approval or rejection of the bond based on Customs requirements as set forth in 19 CFR Part 113.

Riders and changes to continuous bonds may be submitted electronically and are subject to the same verification process described above. All requirements as set forth in § 113.24 are applicable to electronically transmitted riders and changes.

Terminations also may be submitted electronically. However, electronically submitted terminations will only be accepted if the ABI filer transmitting the termination is the principal on the bond in question or the ASI surety transmitting the termination is the surety of record. All requirements as set forth in § 113.27, Customs Regulations, are applicable.

A continuous bond activity record associated with a particular entry will be created for each use of the continuous bond as identified by entry or entry summary input. Bond information provided by either the ABI filer, or Customs input at entry, will be compared to the bond information provided or input at entry summary. This will greatly increase the integrity of Customs bond files both for single entry and continuous bonds.

Filing of Corporate Powers of Attorney by Sureties:

ASI participants may transmit corporate powers of attorney, as provided in § 113.37(g) and any updates or revocations electronically through the interface pursuant to procedures set forth in Customs Publication No. 552. Customs will return the acceptance or rejection message to the appropriate ASI filer.

Queries:

ASI participants will have access to certain query capabilities through the interface as identified in Customs Publication No. 552. The queries will include access to information pertaining to their particular single entry bond(s) and continuous bond activity. Additionally, query capability would be available to participants for individual entry(s), fines and penalty case information and individual bill(s). These query capabilities would be limited to those transactions where the ASI surety is listed as the surety of record. The availability of information within these queries will be based on the determination of whether the data queried is confidential.

DATA TRANSMITTED

In order that an ASI surety can verify that it is responsible for a bond, Customs proposes to release certain data to the sureties regarding the transactions that the bonds are covering. Some data elements shall be released to the sureties prior to release of the cargo; some after release of the cargo; and some subsequent to the breach of the bond by the importer.

I. *Data Elements Provided to Sureties Prior to Release of Cargo:*

A. *Single Entry Verification Request.* The following data elements will be provided to participating sureties prior to the release of cargo to obtain verification of the single entry bond by the ASI surety:

1. Surety Code
2. Entry Filer Code
3. Entry Number
4. Entry Type
5. District Port of Entry
6. Importer Number (Principal on Single Entry Bond)
7. Other Government Agency Indicator
8. Filer Reference Number
9. Surety Reference Number
10. Total Entered Value (Estimated)
11. Bond Liability Amount
12. Bond Effective Date
13. Bond Action Code (Indication of whether initial, replacement or additional bond is being use.)
14. Bond Activity Code
15. Verification Request Date and Time
16. All Tariff Numbers Available at Time of Request

B. *Importer Bond Query.* The following data elements will be provided to sureties prior to release of cargo only if the surety queries specific Internal Revenue Numbers where the code of the querying surety code matches the surety code on file. This is provided regardless of a claim by U.S. Customs.

1. Importer Number
2. Name of principal with Importer Number
3. Surety Code
4. Bond Type
5. Bond Activity Code
6. Bond Amount
7. District Port where Bond is Filed
8. Bond Effective Date
9. Bond Number

C. *Continuous Bond Application Verification.* The following data elements will be provided to sureties to obtain a verification on a continuous bond application prior to approval by Customs.

1. Surety Reference Number
2. Surety Code
3. Bond Type
4. Bond Activity Code
5. Execution Date
6. Effective Date
7. Bond Liability Amount
8. Number of Bond Users
9. Corporate Surety Power of Attorney
10. Principal's Importer Number
11. Principal's Name
12. Principal's Address
13. Co-Principal's Importer Number
14. Co-Principal's Name
15. Co-Principal's Address
16. Importer Number of each bond user
17. Name of each bond user
18. Merchandise Description
19. Actual or Estimated Amount Indicator
20. Value
21. Duty
22. Taxes and Fees
23. Type of Business (Sole Proprietorship, Partnership or Corporation)
24. Customs Bond Number

II. *Data Elements Provided After Release of Cargo:*

The following data elements will be provided regardless of a claim by Customs, but after the release of cargo. They will be available via a query and/or a weekly batch reporting to the participating sureties.

A. *Single Entry Bond Activity:*

1. Surety Code
2. Entry Filer Code
3. Entry Number
4. Importer Number of principal on bond
5. Entry Date
6. Entry Status
7. Bond Type
8. Bond Activity Code
9. Bond Action Code
10. Total Entered Value (Estimated)
11. Bond Liability
12. Bond Effective Date
13. Filer Reference Number
14. Surety Reference Number
15. Source Document (Indication of whether bond data was submitted to Customs or input by Customs)
16. Verification Sent (Date and Time)
17. Verification Response (Yes or No, Date and Time)
18. Customs Override Indicator
19. Estimated Duty
20. Estimated Taxes and Fees

B. *Continuous Bond Activity:*

1. Surety Code
2. Bond Number
3. Importer Number of principal
4. Bond Type
5. Bond Activity Code
6. Bond Amount
7. Bond Effective Date
8. Filer Code
9. Entry Number
10. Date of Entry
11. Entry Status
12. Total Entered Value (Estimated)
13. Bond Action Code
14. Filer Reference Number
15. Surety Reference Number
16. Source Document
17. Estimated Duty
18. Estimated Taxes and Fees

C. *Open Entry Data* (Data on entries that have not yet been liquidated):

1. Filer Code
2. Entry Number
3. Entry Type
4. Region/District Port of Entry
5. Entry Date
6. Entry Summary Date
7. Entry Release Date
8. Reason for Late Filing
9. Late Report Date
10. Cancel Reason
11. Cancel Date
12. Multiple Bond Indicator (If more than one bond covers this entry)
13. Surety Code
14. Bond Type
15. Bond Number
16. Surety Reference Number
17. Filer Reference Number
18. Bond Action Code
19. Bond Activity Code
20. Bond Effective Date
21. Bond Liability Amount
22. Bond Location
23. Bond Status (On Single Entry Bonds)
24. Source Document
25. Principal's Importer Number
26. Principal's Name
27. Extension/Suspension Code
28. Extension/Suspension Date
29. Number of Extension
30. Reject Date
31. Protest Status
32. Protest Date
33. Document filing Location
34. Payment Status
35. Delayed Antidumping Duties
36. Delayed Countervailing Duties
37. Collection Date
38. Estimated Duty
39. Estimated Taxes
40. Estimated Antidumping Duties
41. Estimated Countervailing Duties
42. Estimated Fees

D. *Liquidated Entry Data:*

1. Filer Code
2. Entry Number
3. Surety Code
4. Number of Liquidation
5. Liquidation Date
6. Document Filing Location
7. Multiple Bonds (This Entry)
8. Multiple Sureties (This Entry)
9. Liquidation results (No change, Increase or Refund)

III. *Data Elements Provided After a Bill Has Been Issued:*

The following data elements will be provided to a surety after a bill has been issued.

1. Bill Number
2. Surety Code
3. Bill Type
4. Bill Date
5. Status Code
6. Bill Age
7. Filer Code
8. Entry Number
9. Importer Number
10. Importer's Name
11. Importer's Address
12. Protest Status
13. Protest Date
14. Protest Decision Date
15. Bill Amount
16. Principal Amount
17. Interest Amount
18. Payment Amount
19. Cancel Code
20. Estimated Duty
21. Estimated Taxes
22. Estimated Antidumping Duties
23. Estimated Countervailing Duties
24. Estimated Fees
25. Paid Duty
26. Paid Taxes
27. Paid Antidumping Duties
28. Paid Countervailing Duties
29. Paid Fees
30. Liquidated Duty
31. Liquidated Taxes
32. Liquidated Antidumping Duties

33. Liquidated Countervailing Duties
34. Liquidated Fees

IV. *Fines, Penalties and Forfeiture Data Elements and Entry Line Item Detail Provided After Breach Has Occurred:*

The following data elements will be provided to sureties after a breach has occurred.

1. Case Number
2. Surety Code
3. Bond Number
4. Bond Type
5. Bond Effective Date
6. Violation Type
7. Violation Date
8. Status Sequence
9. Current Status
10. System Status Date
11. Effective Date
12. Filer Code
13. Entry Number
14. Penalty Amount
15. Mitigated Amount
16. Collection Amount
17. Violation Citation
18. Violation Description
19. Violator Identification
20. Violator Name
21. Violator Address
22. Number of Total Lines on an entry
23. Line Number
24. Tariff Number
25. Country of origin
26. Country of export
27. Quantity–Unit of measure
28. Value
29. Duty
30. Fees
31. Internal Revenue Tax
32. Antidumping Duty Case Number
33. Antidumping Duty
34. Countervailing Duty Case Number
35. Countervailing Duty
36. In Transit Date and Number

Customs recognizes that some of the information that it proposes to provide sureties may be considered to be confidential business information which is protected from disclosure under exemption (b)(4) of the Freedom of Information Act. Accordingly, Customs is particularly inter-

ested in receiving comments from brokers, importers, or other affected individuals on whether the disclosure of any of this information will cause competitive harm.

PARTICIPATION IN ASI

The only parties that are eligible to participate in ASI are sureties as defined in §§ 113.35, 113.36 and 113.37 of the Customs Regulations and ASI service bureaus. An ASI service bureau is an individual, partnership, association or corporation which is approved by Customs to provide communication facilities and data processing services for sureties, but which is not, itself, a surety.

A prospective applicant shall submit a letter of intent to the Assistant Commissioner, Information Management, or designee. The letter of intent shall set forth a commitment to develop, maintain and adhere to the performance requirements and operational standards of the ASI system and all applicable Customs Regulations in order to ensure the validity, integrity and confidentiality of the data transmitted. The letter of intent shall also contain statements that participation constitutes declaration by the surety that, to the best of his knowledge, all transactions filed electronically fully disclose Customs bond information which is true and correct; that transmission of an affirmative response accepting responsibility of a bond amount shall constitute an irrevocable acceptance of bond liability; that the surety will agree to accept the electronic information available through ACS/ASI as legally sufficient evidence of their obligation for their bonds filed through ASI; and that the surety will not regularly request paper copies of the entry package as the basis for evidence of such obligation on those ASI filed bonds.

The letter of intent shall also contain a brief description of the company's computer hardware and data communications to be used and the estimated completion date of the programming; the name and telephone number of the ABI filer selected to participate in the ASI testing; a list of all the offices that will communicate with ACS regarding the prospective ASI filer and the approximate start-up time for each office; and the names and telephone number of the principal management and technical contacts for operations, applications program development, and computer data communications and operations.

Each application/letter of intent shall be evaluated by the Assistant Commissioner, Information Management, or his designee. Evaluation may require an investigation. If permission to test ASI is denied to an applicant, written notice shall be sent to the applicant and there is an appeal procedure. All approved applicants shall demonstrate that their system can interface directly with Customs computer and ensure accurate and timely submission of required data. Inability to pass testing shall result in denial of operational status.

Once operational, participants shall be required to adhere to the performance requirements and operational standards of the ASI system and to maintain a high level of quality in the transmission of data or be subject to revocation or suspension of ASI privileges. The privilege of

ASI participation may be revoked if it is determined that participation in the system was obtained through fraud or the misstatement of a material fact or that the participant's continued use of ASI would pose a potential risk of significant harm to the integrity and functioning of the ACS system. Other grounds for immediate revocation are if the participant, without just cause, is considered to be significantly delinquent either in the number of outstanding bills or dollar amounts or if the participant has improperly disclosed any data relative to the business of one importer to a third party unrelated to the transaction to which the ASI data pertains.

PROPOSAL

This document proposes to amend the Customs Regulations to provide for ASI by creating a new subpart H in Part 113.

CUSTOMS PUBLICATION NO. 552

This document cites Customs Publication No. 552, "CATAIR" as the source document for many of the operational requirements and standards for ASI. Copies of the proposed sections of Publication No. 552 relating to ASI may be obtained by contacting Diane Hundertmark at (202) 927–0355 or by writing to the Office of Automated Commercial Systems, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Users of ASI will be notified at least 30 days in advance of any changes regarding ASI set forth in Customs Publication No. 552.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. As stated previously, Customs is particularly interested in receiving comments regarding the data elements that are proposed to be provided to sureties. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4) and § 103.11(b), Customs Regulations (19 CFR 103.11(b)),on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, U.S. Customs Service, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, the amendment is not subject to the regulatory analysis requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER

The document does not meet the criteria for a "major rule" as defined in section 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

PAPERWORK REDUCTION ACT

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget (OMB) for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3540(h)). Comments on the collection of information should be sent to the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington D.C. 20503, with copies to the U.S. Customs Service at the address previously specified. The collection of information in this regulation is in §113.83. The information is necessary to determine eligibility to participate in the Automated Surety Interface program. The likely respondents are business or other for-profit institutions.

Estimated total annual reporting and/or recordkeeping burden: 10,155 hours.

Estimated average annual burden per respondent and/or recordkeeper: .0169 hours.

Estimated number of respondents: 600,310.

Estimated annual frequency of responses: 1.

Part 178, Customs Regulations (19 CFR Part 178), which lists the information collections contained in the regulations and control numbers assigned by OMB would be amended accordingly if this proposal is adopted.

DRAFTING INFORMATION

The principal author of this document was Harold M. Singer, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 113

Air carriers, Customs duties and inspection, Exports, Freight, Imports, Surety bonds, Vessels.

PROPOSED AMENDMENTS

It is proposed to amend part 113, Customs Regulations (19 CFR part 113), as set forth below.

PART 113—CUSTOMS BONDS

1. The authority citation for part 113 continues in part to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624.

* * * * * * *

2. It is proposed to revise § 113.0 to read as follows:

§ 113.0 Scope.

This part sets forth the general requirements applicable to bonds. It contains the general authority and powers of the Commissioner of Cus-

toms in requiring bonds, bond approval and execution, bond conditions, general and special bond requirements, the requirements which must be met to be either a principal or a surety, the requirements concerning the production of documents, the authority and manner of assessing liquidated damages and requirements for canceling the bond or charges against a bond. The part also sets forth the requirements and procedures for participation in the Automated Surety Interface (ASI) and for the electronic filing of both single entry and continuous bonds.

3. It is proposed to revise part 113 by adding a new subpart H, encompassing §§ 113.81 through 113.96, to read as follows:

SUBPART H—AUTOMATED SURETY INTERFACE AND ELECTRONIC BOND FILING

Sec.

SUBPART H—AUTOMATED SURETY INTERFACE AND ELECTRONIC BOND FILING

§ 113.81 General.

The Automated Surety Interface (ASI) is a module of the Customs Automated Commercial System (ACS) which allows participants to transmit data electronically to Customs through ASI and to receive transmissions through ACS. Through ASI, Customs is able to establish and verify recognized bond liability. ASI will provide the participating surety a method to regularly obtain timely information regarding the status of individual transactions on which he is listed as the surety of record. This subpart sets forth general requirements for the input of both single entry bonds and continuous bonds through ASI. Use of this system is voluntary and optional on behalf of the filer. Unless otherwise specified in this subpart, bonds processed electronically through ASI are subject to the same requirements set forth earlier in this part. Paper bonds still must be submitted for bonds filed electronically.

§ 113.82 Eligibility for participation in ASI

The only parties that are eligible to participate in ASI are sureties as defined in §§ 113.35, 113.36 and 113.37 of this chapter and ASI service

bureaus. An ASI service bureau is an individual, partnership, association or corporation which is approved by Customs to provide communications facilities and data processing services for sureties, but which is not, itself, a surety.

§ 113.83 Application.

(a) *Place submitted.* A prospective participant in ASI shall submit a letter of intent to the Assistant Commissioner, Information Management, or designee.

(b) *Contents.* The letter of intent shall set forth a commitment to develop, maintain and adhere to the performance requirements and operational standards of the ASI system as set forth by Customs in Customs Publication No. 552 and all applicable Customs Regulations in order to ensure the validity, integrity and confidentiality of the data transmitted. The letter of intent shall also contain statements that participation constitutes declaration by the surety that, to the best of his knowledge, all transactions filed electronically fully disclose Customs bond information which is true and correct; that transmission of an affirmative response accepting responsibility of a bond amount shall constitute an irrevocable acceptance of bond liability; that the surety agrees to accept the electronic information available through ACS/ASI as legally sufficient evidence of their obligation for their bonds filed through ASI; and that the surety agrees to rely on the ACS/ASI systems data and electronic verification as evidence of liability and will not regularly request copies of supporting documentation except in circumstances found justifiable by Customs. In addition, the letter of intent shall contain the following:

(1) A brief description of the company's current or planned computer hardware and data communications to be used and the estimated completion date of the programming;

(2) The name and telephone number of the ABI filer selected to participate in the ASI testing (if known). The agent shall be an operational ABI filer for cargo selectivity and entry summary;

(3) A list of all the offices that will communicate with ACS regarding the prospective ASI filer and the approximate start-up time for each office. The locations and Customs District/Port numbers of these offices are to be included. The corporate headquarters shall be specified; and

(4) The names and telephone numbers of the principal management and technical contacts for operations, applications program development, and computer data communications and operations. If the system is being developed or supported by a service center, and/or a software vendor, include the name of the company and the contact person and the contact person's telephone number.

§ 113.84 Action on application.

(a) *Evaluation.* The Assistant Commissioner, Office of Information Management, or his designee shall evaluate each application to determine whether:

(1) The applicant currently has or plans to have the equipment and capability to be in compliance with the ASI system performance procedures and standards as described in Customs Publication No. 552 and § 113.85 of this chapter; and

(2) The applicant is delinquent or otherwise remiss in their transactions with Customs.

(b) *Investigation.* If there is any cause to question the qualifications or fitness of the applicant to participate in ASI, the Assistant Commissioner, Office of Information Management, or his designee shall investigate the applicant. The investigation may include, but need not be limited to:

(1) The accuracy of the information provided in the letter of intent;

(2) The business integrity of the applicant;

(3) The character and reputation of an individual applicant or a member of a partnership or an officer of an association or corporation; and

(4) The character and reputation of the software vendor.

(c) *Determination.* If the Assistant Commissioner, Office of Information Management, or his designee, determines, either without an investigation or after an investigation, that an applicant is approved to test for ASI, permission will be so granted in writing. If permission to test ASI is denied to an applicant, written notice, including the grounds for the denial, shall be sent to him. The applicant may appeal the denial in the manner prescribed in § 113.89 of this subpart and the procedures set forth in that section for handling an appeal shall apply.

§ 113.85 System performance and testing requirements.

(a) *General.* The testing and performance requirements and operational standards for electronic bonds are detailed in Customs Publication No. 552, "CATAIR", which is updated periodically. The Office of Automated Commercial Systems, Customs Headquarters, upon request, shall provide each prospective participant with a copy of this publication.

(b) *Testing.* Each prospective participant shall demonstrate that his system can interface directly with the Customs computer and ensure accurate submission of required data. Such demonstration will include intensive testing of the participant's system and monitoring of its performance in accordance with Customs Publication No. 552. Inability to pass testing shall result in denial of operational status.

§ 113.86 Confidentiality of data released through ASI.

(a) *Data released to sureties.* Customs shall provide ASI sureties electronically with certain data so that the sureties may make informed decisions on whether to accept liability for a particular transaction. Some data elements shall be released to the sureties prior to release of the cargo; some after release of the cargo; and some subsequent to the breach of the bond by the importer. The list of data elements and stages that they will be released are set forth in Customs Publication No. 552.

(b) *Confidentiality of data.* All data released by Customs to ASI participants regarding a particular entry shall be considered confidential and shall not be released to any parties which do not have a nexus to the transaction. Improper disclosure of the data elements may subject the ASI participant to revocation of operational status.

§ 113.87 Failure to maintain performance standards.

(a) *General.* Once operational on ASI, participants shall adhere to the performance requirements and operational standards of the ASI system and maintain a high level of quality in the transmission of data, as defined in Customs Publication No. 552 and Customs directives and policy statements, or be subject to revocation or suspension of ASI privileges.

(b) *Probational status.* Any ASI participant who does not adhere to the performance requirements and operational standards and maintain a high level of quality in the transmission of data may be placed on probational status.

(1) *Notification.* The participant will be notified, electronically and in writing, by the Director, ACS, of any action to place the participant on probation. The notice shall specifically set forth the grounds for the proposed probation, and advise the participant that he will have 15 days from the date of the notice to show cause why the probationary period should not take effect. If the participant fails to respond within the allotted time, or fails to show to the satisfaction of the Director, ACS, that the probationary period should not take effect, the Director shall notify the participant of the effective date of the probationary period.

(2) *Length of probationary period.* The minimum length of the probationary period is 30 days. The Director, Office of ACS, shall monitor the participant's performance, including working with the participant and providing necessary guidance, during the probationary period and may extend the period up to a maximum of 90 days if the participant's performance remains below standard.

(3) *Suspension following probationary period.* If deficiencies are not corrected within the probationary period, the participant shall be suspended from operational status. The participant shall be notified, electronically and in writing, by the Director, Office of ACS, of any action to suspend participation. The notice will specifically set forth the grounds and effective date for the suspension, and the right to appeal the suspension to the Assistant Commissioner, Office of Commercial Operations, within 10 days following the date of the written notice of suspension.

(4) *Reinstatement following suspension.* To obtain reinstatement to operational status, a suspended participant must submit a letter to the Director, Office of ACS, stating that the deficiencies for which the suspension was invoked have been corrected. If the Director is satisfied that the deficiencies have been corrected, the participant may be reinstated. The Director may require the participant to demonstrate compliance with the system performance requirements and operational standards specified in § 113.85 of this part before reinstating the participant to operational status.

§ 113.88 Revocation of ASI participation.

(a) *Reasons for revocation.* The privilege of ASI participation may be immediately revoked under the following circumstances:

(1) *Fraud or misstatement of material fact.* The Director, Office of Trade Operations, may revoke ASI participation if it is determined at any time that participation in the system was obtained through fraud or the misstatement of a material fact;

(2) *Risk of significant harm to the ACS system.* The Director, Office of ACS, may revoke ASI participation if the participant's continued use of ASI would pose a potential risk of significant harm to the integrity and functioning of the ACS system; or

(3) *Significant delinquency.* The Director, Office of ACS, may revoke ASI participation if the participant, without just cause, is considered to be significantly delinquent either in the number of outstanding bills or dollar amounts; or

(4) *Release of confidential information.* The Director, Office of ACS, may revoke ASI participation if the participant has improperly disclosed any data relative to the business of one importer to a third party unrelated to the transaction to which the ASI data pertains.

(b) *Notification of revocation.* The participant shall be notified of the revocation, electronically and in writing, by the appropriate Director. The notice shall specifically set forth the grounds and effective date of revocation, and the right to appeal the revocation.

§ 113.89 Appeal of suspension or revocation.

(a) *Timeliness of appeal.* A written appeal of a notification of suspension or revocation of ASI privileges shall be filed with the Assistant Commissioner, Office of Commercial Operations, within 10 days following the date of the written notice of action to suspend or revoke participation.

(b) *Effect of appeal on revocation or suspension.* Except in cases of revocation, when an appeal is filed timely, participation in ASI may continue during the period from when the appeal is filed until the appeal is decided.

(c) *Customs response to appeal.* The Customs officer who receives the appeal shall stamp the date of receipt on the appeal and the stamped date is the date of receipt for purposes of the appeal. The Assistant Commissioner, Office of Commercial Operations, shall inform the participant of the date of receipt and the date that a response is due. The Assistant Commissioner shall send his decision to the participant, stating his reasons therefore, by letter mailed within 30 working days following receipt of the appeal, unless this period is extended with due notification to the participant.

§ 113.90 Eligibility criteria for electronic bond filing.

To be eligible to file electronic Customs bonds, the filer must be an operational ABI participant (see § 143.1, Customs Regulations *et seq.*), and

the surety must either be qualified to use ASI or use an eligible service center (see § 113.82).

§ 113.91 Electronic single entry Customs bond application and approval process.

(a) *Application.* An ABI filer will transmit bond information and the associated entry information to Customs pursuant to the operations and procedures set forth in § 143.31 *et seq.*, Customs Regulations, and Customs Publication No. 552. All bond information shall be associated with a particular entry. If the information is found error-free by Customs, Customs shall transmit to the ASI surety indicated by the filer certain information identifying the transaction and a request for verification for the surety to acknowledge acceptance of liability for the particular transaction.

(b) *Approval.* All bonds are subject to Customs approval in accordance with Customs bond requirements set forth in this part. The ASI surety shall indicate whether liability for the particular bond is accepted or rejected within the time frame specified in Customs Publication No. 552. If the surety transmits an acceptance of liability and Customs accepts the bond, Customs shall so notify the entry filer by electronic message. Transmission of an acceptance of liability by the surety is irrevocable admission of liability. If no response is received from the ASI surety within the specified time frame or Customs receives a transmitted rejection of liability from the ASI surety, Customs shall send an appropriate electronic message to the entry filer that the cargo cannot be released under that bond.

§ 113.92 Electronic continuous Customs bond application and approval process.

(a) *Application.* The ABI filer or ASI surety may transmit continuous bond/application information pursuant to the operations and procedures set forth in § 143.31 *et seq.*, Customs Regulations and Customs Publication No. 552, except for instances where the continuous bond is to be obligated by two or more sureties. If the information is transmitted by an ABI filer and found to be error-free by Customs, Customs shall transmit to the surety indicated by the filer certain information identifying the transaction and a request for verification for the surety to acknowledge acceptance of liability for the particular transaction.

(b) *Approval.* All bonds are subject to Customs approval in accordance with Customs bond requirements set forth in this part. If the information is transmitted by the ASI surety, Customs automatically considers the bond verified. If Customs requests the ASI surety to verify that it is liable for a particular transaction under a specified bond, the surety shall respond to Customs within the time frame specified in Customs Publication No. 552. If the surety transmits an acceptance of liability and Customs approves the bond, Customs shall so notify the ABI filer by electronic message. Transmission of acceptance of liability by the ASI surety is irrevocable admission of liability. If no response is received

from the ASI surety within the specified time frame or Customs receives a transmitted rejection of liability from the ASI surety, Customs shall send an appropriate electronic message to the ABI filer.

§ 113.93 Changes made on electronic bonds and electronic riders.

Riders and changes, may be submitted electronically in accordance with the procedures set forth in Customs Publication No. 552 and are subject to the verification and approval process detailed in §§ 113.91 and 113.92.

§ 113.94 Terminations made on electronic bonds.

Terminations may be submitted electronically in accordance with the procedures set forth in Customs Publication No. 552 and are subject to the same requirements as set forth in § 113.27. An electronic termination can only be transmitted by the principal or the surety of record.

§ 113.95 Electronic corporate powers of attorney.

ASI participants may transmit corporate powers of attorney as provided for in § 113.37(g) and any updates or revocations electronically through ASI pursuant to the procedures set forth in Customs Publication No. 552. Customs shall return the acceptance or rejection message to the appropriate ASI filer.

§ 113.96 Electronic queries.

ASI participants shall be able to electronically inquire to Customs about the status of transactions where the ASI surety is listed as the surety of record. The availability of information within these queries shall be based on the determination of whether the data queried is confidential.

CAROL HALLETT,
Commissioner of Customs.

Approved December 23, 1992.
JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, January 22, 1993 (58 FR 5680)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 93–4)

AMERICAN ALLOYS, INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 91–10–00782

[Plaintiffs' motion for judgment upon the agency record is denied in part and remanded in part. The case is remanded to Commerce with instructions to measure tax absorption in home market sales so as to limit the adjustment to United States Price by the amount of tax passed through to home market purchasers.]

(Dated January 11, 1993)

Baker & Botts (*William D. Kramer, Charles M. Darling, IV,* and *Anne Talbot*), for plaintiffs.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen,* Director, Civil Division, Commercial Litigation Branch, U.S. Department of Justice (*A. David Lafer*), *Robert E. Nielsen,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for the defendant.

OPINION AND JUDGMENT

CARMAN, *Judge:* Pursuant to Rule 56.1 plaintiffs move for judgment upon the agency record. Plaintiffs challenge a portion of *Final Determination of Sales at Less Than Fair Value: Silicon Metal from Argentina,* 56 Fed. Reg. 37,891, 37,895 (Aug. 9, 1991), Pub. Doc. 157 (A.R. 2275, 2279), issued by the International Trade Administration, U.S. Department of Commerce (Commerce).

This action is brought pursuant to section 516A (a)(2)(A)(i)(II) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(II) (Supp. 1991), and pursuant to 28 U.S.C. § 1581(c) (1988), which give this Court jurisdiction to review any negative part of a final affirmative antidumping duty determination by Commerce. The Court remands Commerce's determination for recalculation of the United States price adjustment and reserves decision on its review of this issue pending Commerce's remand results.

BACKGROUND

United States producers of silicon metal[1] filed a petition with Commerce in August of 1990 requesting that antidumping duties be imposed upon silicon metal imports from Argentina which plaintiffs alleged were being sold at less than fair value. Commerce initiated an investigation,

[1] Petitioner states in its brief that silicon metal is not actually a metal, but rather, the industry name for a product that is at least 96 percent pure silicon with trace impurities.

and as a result of that investigation made an affirmative preliminary determination, and subsequently an affirmative final determination, that silicon metal from Argentina was being sold at less than fair value. *Notice of Initiation of Investigation: Silicon Metal from Argentina,* 55 Fed. Reg. 38,719 (Sept. 20, 1990); *Preliminary Determination of Sales at Less Than Fair Value: Silicon Metal From Argentina,* 56 Fed. Reg. 13,116, 13,118 (March 29, 1991), Pub. Doc. 117 (A.R. 1819–21); *Final Determination,* 56 Fed. Reg. 37,891, 37,895 (Aug. 9, 1991), Pub. Doc. 157 (A.R. 2275, 2279).

In the course of its investigation, Commerce presented an Antidumping Request for Information (Questionnaire) and a Deficiency Questionnaire to Electrometalurgica Andina, S.A.I.C. (Andina), an Argentine producer and exporter of silicon metal to the United States. In both its Questionnaire Response and its Deficiency Response, Andina claimed that it was entitled to adjustments to United States Price (U.S.P.), that would increase U.S.P., for certain national and provincial taxes either not collected on export sales or rebated upon exportation. Questionnaire Response, Sec. B at 8–10, Pub. Doc. 59 (A.R. 1004–06); Deficiency Response at 33–37. Pub. Doc. 72 (A.R. 1191–95). These claimed adjustments included a 12.5 percent increase in U.S.P. for a rebate of national taxes received under Argentina's "Reembolso" program. Deficiency Response at 33–37, Pub. Doc. 72 (A.R. 1191–95). Under this program, exporters are eligible for a rebate of certain domestic taxes on physically incorporated inputs of a product. Questionnaire Response, Sec. C at 8, Pub. Doc. 59 (A.R. 1018); Deficiency Response at 34, Pub. Doc. 72 (A.R. 1192). An exporter is eligible to receive a rebate of 12.5 percent of the net value of the exported silicon metal. Deficiency Response, Pub. Doc. 72 (A.R. 1192).

Andina listed the internal taxes imposed on silicon metal in the home market that it claimed provided the basis for the requested 12.5 percent adjustment under the Reembolso program. Deficiency Response, Attach. 10, Pub. Doc. 72 (A.R. 1268–70). The taxes which were listed and that are now at issue are the following:[2]

1. Bank Debits
2. Value Added
3. Mining License
4. Export Promotion Fund
5. Customs Dispatch
6. Letter of Credit
7. Currency Exchange Tax
8. Municipal Tax
9. Energy Purchases
10. Tax on Tires
11. Insurance
12. Truck Engines
13. Fuels
14. Lubricants
15. Retirement Fund
16. Public Works Fund
17. Social Assistance
18. Family Subsidies
19. National Housing Fund
20. Capital
21. Assets
22. Contribucion Solidarra
23. Provincial Real Estate
24. Municipal Real Estate

[2] This list excludes the turnover tax and the Lote Hogar tax, which are not at issue in this case, and the import duties, the statistics tax, and the merchant marine fund tax, for which the Department made a separate adjustment as duty drawback. *Final Determination,* 56 Fed. Reg. 37,891, 37,895 (Aug. 9, 1991), Pub. Doc. 157 (A.R. 2275, 2279).

Commerce preliminarily determined that silicon metal from Argentina was being sold at less than fair value. *Preliminary Determination,* 56 Fed. Reg. 13,116, 13,118 (March 29, 1991), Pub. Doc. 117 (A.R. 1819–21). Commerce increased U.S.P. for the 12.5 percent Reembolso tax rebate, thus reducing the dumping margin on Andina's U.S. export sales. *Id.* Commerce did not conduct a tax pass through analysis on the Reembolso taxes which formed the basis of this adjustment. After all adjustments were made, including adjustments not presently at issue,[3] Commerce preliminarily determined the less than fair value margin to be 2.16 percent *ad valorem. Id.*

Subsequent to Commerce's *Preliminary Determination,* petitioners reiterated their argument that the taxes did not qualify as a basis for adjustment to U.S.P., and asked Commerce to verify that the Reembolso rebate covered taxes for which an adjustment to U.S.P. was made was proper. April 5, 1991 Verification Comments, Pub. Doc. 126 (A.R. 1841–44). In its *Final Determination,* Commerce retained the 12.5 percent adjustment to U.S.P. for the Reembolso program tax rebate and recalculated the dumping margin to be 8.65 percent *ad valorem.* 56 Fed. Reg. at 37,894–95, 37,899, Pub. Doc. 157 (A.R. 2278–79, 2283); *Antidumping Duty Order: Silicon Metal from Argentina,* 56 Fed. Reg. 48,779 (Sept. 26, 1991).

CONTENTIONS OF THE PARTIES

Plaintiffs argue that under the Tariff Act of 1930, 19 U.S.C. § 1677a(d)(1)(C) (1988), adjustments to U.S.P. for tax rebates are limited to indirect taxes imposed directly on the final stage product or its physically incorporated inputs. Plaintiffs contend that Commerce failed to determine that the rebated taxes claimed by Andina to provide a basis for adjustment to U.S.P. were indirect taxes directly imposed on silicon metal or inputs physically incorporated into silicon metal, and that this failure was contrary to law. Plaintiffs state further that pursuant to 19 U.S.C. § 1677e(b)(1) (1990), Commerce was required to, but failed to, verify that the rebated taxes were imposed on silicon metal or its components, the existence and incidence of the taxes, and the pass-through of the taxes in the home market price of silicon metal. 19 U.S.C. § 1677e(b)(1), provides as follows:

§ 1677e. Verification of information.

* * * * * * *

(b) Verification

The administering authority shall verify all information relied upon in making—

(1) a final determination in an investigation.

Defendant asserts that plaintiffs are seeking a countervailable subsidy inquiry in the context of an antidumping investigation. Defendant responds to plaintiffs' position by stating that neither the statutory lan-

[3] For example, adjustments made for taxes as duty drawbacks are not disputed by plaintiffs.

guage nor the legislative history of 19 U.S.C. § 1677a(d)(1)(C), requires Commerce to undertake a subsidy inquiry in the context of an independent antidumping investigation. Defendant suggests that plaintiffs seek relief under the countervailing duty statute if they believe that respondent is benefitting from alleged subsidies due to the over-rebate of indirect taxes paid on the exported merchandise or components "physically incorporated" therein.

Additionally, defendant contends that plaintiffs failed to raise the issue of tax pass-through in the underlying administrative proceeding and are thus precluded from raising this issue now. Regardless of whether this issue is now raised, defendant argues that the tax pass-through issue lacks merit because 19 U.S.C. § 1677a(d)(1)(C), does not legally require Commerce to measure the incidence of indirect taxes that are passed through to respondent's home market customers.

STANDARD OF REVIEW

This Court's jurisdiction to review the final results of an antidumping duty administrative review is limited to determining whether the final results are supported by substantial evidence on the administrative record and are otherwise in accordance with the law. 28 U.S.C. § 1581(c) (1988); 19 U.S.C. § 1516a(b)(1)(B) (1988). § Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd,* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987) (citations omitted).

DISCUSSION

"The antidumping law is designed to protect domestic industries from sales of foreign merchandise at less than fair value which cause or threaten to cause material injury." *Atcor, Inc. v. United States,* 11 CIT 148, 152, 658 F. Supp. 295, 298 (1987). "To achieve this objective, the law requires the imposition of an antidumping duty in the amount by which foreign market value (FMV) exceeds USP." *Id.* To prevent dumping margins from arising due to the fact that the country of exportation assesses certain taxes on home market sales but not on export sales the antidumping law provides for an offsetting adjustment in the calculation of United States price. The applicable statute, 19 U.S.C. § 1677a(d)(1)(C) (1988), provides:

> **(d) Adjustments to purchase price and exporter's sales price.**—The purchase price and the exporter's sales price shall be adjusted by being—
>
> (1) increased by—
>
> * * * * * * *
>
> (C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that

> such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.

Commerce argues that the taxes in issue qualified for an upward adjustment to U.S.P. pursuant to 19 U.S.C. § 1677a(d)(1)(C). According to Commerce, validation under this statute requires the Department to determine "that the rebate program was established by a foreign government to rebate indirect taxes upon exportation, that these taxes are included in the home market sales price of the subject merchandise, and that the rebate is, in fact, paid upon exportation of the subject merchandise." Defendant's Supplemental Memorandum at 4. Based upon this reading of the statute, defendant's verification of information regarding rebates under Argentina's Reembolso program consisted of an examination of the following: the text of Decree 1555 establishing this rebate program, an explanation of its intended purpose, the applicable rebate rates that Andina provided in its Deficiency Response and an export shipping license for U.S. sale number 20017 which states the terms for the application of this rebate. *Id.*

It has been argued in past cases that Commerce should have employed different methods of verification. This Court has responded to one such argument with the following: "The decision to select a particular methodology rests solely within Commerce's sound discretion. As long as there is 'substantial evidence on the record' to support the choice, the Court will sustain the methodology chosen by Commerce." *Hercules, Inc. v. United States,* 11 CIT 710, 726, 673 F. Supp. 454, 469 (1987). Although this Court will not dictate the method of verification that Commerce must use, it will insist that Commerce's verification adhere to statutory requirements.

Physical Incorporation Standard:

The first issue before the Court is whether Commerce's determination to make an upward adjustment to U.S.P. for indirect taxes "imposed * * * directly upon the exported merchandise or components thereof, which have been rebated * * * by reason of the exportation" is supported by substantial evidence in the record and is otherwise in accordance with law. Plaintiffs argue that only rebated taxes which are imposed directly on the exported merchandise or on inputs physically incorporated into the merchandise may serve as the basis for an adjustment under 19 U.S.C. § 1677a(d)(1)(C). Defendant contends that analyzing the adjustment based upon the "physical incorporation standard" would amount to undertaking a countervailing duty investigation in the context of an independent antidumping investigation.

This issue was addressed by the Court in *Huffy Corp. v. United States,* 10 CIT 214, 632 F. Supp. 50 (1986). In that case the Court was presented with the question of whether the International Trade Administration, in the course of an independent antidumping investigation, should allow an upward adjustment to U.S.P. for a rebate that allegedly constituted a subsidy. Plaintiffs in *Huffy* stated that "Congress intended the

antidumping and countervailing duty statutes to work together," and cited 19 U.S.C. § 1677a(d)(1)(D), as an example of the antidumping statute providing an adjustment to U.S.P. in the form of an addition for countervailing duties imposed. *Id.* at 219, 632 F. Supp. at 55. The *Huffy* plaintiffs argued further that "[i]t would defeat the purpose of the countervailing duty law * * * if we allow an addition to the United States price for a rebate program that constitutes a countervailable subsidy." *Id.* Although *Huffy* involved an import duty rebated by reason of exportation rather than an indirect tax rebated by reason of exportation, *Huffy* provides the following useful analysis:

> Moreover, there are further reasons the court and the ITA should refrain from making a subsidy determination in the context of a dumping investigation. The determination of whether a countervailing subsidy exists is a complex one and Congress has provided a separate set of guidelines for the inquiry. In a dumping investigation the ITA is not seeking the same information or asking the same questions it would in a countervailing duty investigation. For this Court to disallow an adjustment to third country price because the import duty rebate is allegedly a countervailable subsidy would be to bypass the countervailable duty statute and essentially penalize the Taiwanese exporters without allowing them an opportunity at the agency level to have a full hearing on whether the rebates are a subsidy.

Id. at 220, 632 F. Supp. at 55–56 (footnote omitted).

In Plaintiffs' Response to Questions from the Court (Plaintiffs' Response), plaintiffs provide a list of four cases in which the countervailing duty standard has been applied in antidumping determinations. Plaintiffs' Response at 11. However, in none of these examples was the countervailing duty standard applied in the context of an independent antidumping investigation. In *Atcor, Inc. v. United States,* the Court stated that if the facts from the countervailing duty and antidumping investigations were similar enough, then the prior countervailing duty investigation could be relied upon. 11 CIT 148, 159, 658 F. Supp. 295, 303–04 (1987). In *Final Determination of Sales at Less Than Fair Value: Light-Walled Welded Rectangular Carbon Steel Tubing from Argentina,* 54 Fed. Reg. 13,913, 13,915 (April 6, 1989), the countervailing duty standard was not independently applied. Instead, the amount of allowable indirect taxes found to have been paid by a concurrent countervailing duty investigation of the subject merchandise was applied. There was a companion countervailing duty investigation covering the barbed wire in *Carbon Steel Wire Rod From Argentina: Final Determination of Sales at Less Than Fair Value,* 49 Fed. Reg. 38,170 (Sept. 27, 1984). Although there was no companion countervailing duty investigation in the fourth case listed by plaintiffs, the results from a related countervailing duty investigation were used. *Barbed Wire and Barbless Fencing Wire from Argentina: Final Determination of Sales at Less Than Fair Value,* 50 Fed. Reg. 38,563 (Sept. 23, 1986). Thus, this last case did not involve a situation where a countervailing duty investigation was or-

dered to be undertaken in the context of an independent antidumping investigation. Rather, results were at hand that could be borrowed and applied to the case.

In this case there is no companion countervailing duty investigation nor is there a related case from which results could be borrowed (nor should be borrowed). Commerce is not required to undertake a countervailing duty inquiry in the context of an independent antidumping investigation. Thus, Commerce properly determined that it need not conduct a "physical incorporation" subsidy inquiry before making an upward adjustment to U.S.P. for indirect taxes rebated pursuant to Argentina's Reembolso program. This holding does not leave plaintiffs without recourse; they are free to petition for relief under the countervailing duty statute.

Measurement of Tax Incidence:

The second issue before the Court is whether Commerce was required to measure the tax incidence in Argentina. Commerce objects to the Court's consideration of the tax pass through question since it claims that plaintiffs failed to exhaust their administrative remedies with respect to this issue. Defendant argues that plaintiffs did not specifically raise the pass through issue before Commerce and are thus precluded from raising the issue now. The Court disagrees with Commerce's position and holds-that plaintiffs may raise the issue of whether Commerce is required to analyze whether those qualifying taxes have been passed through to customers in the home market.

The record shows, nevertheless, that plaintiffs did in fact argue that Andina's incidence of tax should be measured.

> The Department should require Andina (1) to explain the basis on which it claims that an adjustment for noncollection or rebate of each of these taxes is allowable and (2) in those instances (if any) in which an adjustment conceivably might be allowable, to provide a full explanation of how the tax is calculated, assessed, and paid; translations of relevant laws; and *a full explanation (including worksheets) of how it calculated the incidence of the tax* and amount of the adjustment claimed with respect to the tax.

Petitioners' January 24, 1991, Comments at 15, Pub. Doc. 80 (A.R. 1355) (emphasis added).

Even if there were not evidence in the record showing that the issue was raised below, plaintiffs' futility argument would be well taken. Commerce itself argues in its brief that it does not agree with this Court's interpretation of 19 U.S.C. § 1677a(d)(1)(C), in *Zenith Elecs. Corp. v. United States*, 10 CIT 268, 633 F. Supp. 1382 (1986), *appeal dismissed*, 875 F.2d 291 (Fed. Cir. 1989) (*Zenith I*). Defendant lists ten determinations it made prior to plaintiffs' hearing in which Commerce stated its "well-established position". that the statute does not require any tax pass through measurement. Defendant's Brief at 32–33. The Court agrees with plaintiffs' position that further arguing the pass

through issue would have been a futile act in light of defendant's prior determinations. The Court now turns to the tax pass through question.

The tax pass through question has been addressed by this Court in the *Zenith* line of cases. *Zenith I,* 10 CIT at 268, 633 F. Supp. at 1382; *Zenith Elecs. Corp. v. United States,* 14 CIT 831, 755 F. Supp. 397 (1990) (*Zenith II*); *Zenith Elecs. Corp. v. United States,* 15 CIT ____, ____, 770 F. Supp. 648, 650–51 (1991) (*Zenith III*).

> In *Zenith [I],* 10 CIT 268, 633 F. Supp. 1382 (1986), *appeal dismissed,* 875 F.2d 291 (Fed. Cir. 1989) this Court held that § 772(d)(1)(C) of the Tariff Act of 1930 as amended, 19 U.S.C. § 1677a(d)(1)(C), requires commerce to account for forgiven tax on exported merchandise by making an upward adjustment to United States Price ("USP") in the amount actually forgiven on the exports. This Court has ruled that the statutory language requires Commerce to calculate the adjustment for forgiven taxes as an addition to USP in the amount of tax forgiven on exports, and to measure the extent to which tax was actually passed through to home market purchasers so that only the forgiveness of that amount of tax can enter into the calculations.

Zenith III, 15 CIT at ____, 770 F. Supp. at 650–51.

As in *Zenith II,* Commerce argues that its interpretation is consistent with the General Agreement on Tariffs and Trade and that "plaintiffs' interpretation of the tax clause would impose upon Commerce a task far more complex and burdensome than anything envisioned by Congress." Defendant's Brief at 69. This Court agrees with *Zenith II*'s response to these arguments:

> [W]e cannot excuse Commerce from adhering to statutory directives because doing so would "be an enormous and extremely complex task." The Court need not explain why that is no excuse for disregarding the law. Furthermore, correct interpretation of the statute is not contrary to GATT.

Zenith II, 14 CIT at 840, 755 F. Supp. at 408.

The Court addressed the tax pass through requirement of § 1677a(d)(1)(C) prior to the *Zenith* line in *Huffy Corp. v. United States,* 10 CIT 214, 632 F. Supp. 50 (1986). After stating that statutes should be interpreted so that no part is rendered meaningless, the Court noted the following:

> Congress included a special requirement in section 1677a(d)(1)(C) that it did not put in section 1677a(d)(1)(B). We must conclude that Congress recognized that not all taxes are passed on to the home market, and therefore required some showing that such a tax is passed on before its rebate could be the source of an adjustment. To support an adjustment for a tax rebate there must be substantial evidence in the record to support the conclusion that the tax was passed on to the home market.

Huffy, 10 CIT at 221, 632 F. Supp. at 56.

Commerce contends that its interpretation of the tax clause is consistent with the legislative history of the provision. This Court, however,

finds that the legislative history of the statute supports the argument that Congress intended the administering agency to measure tax absorption. For example, while explaining the definitions of "purchase price" and "exporter's sales price," two terms used in 19 U.S.C. § 1677a(d)(1)(C), the Senate Committee gave examples of when an adjustment would and would not be permitted.

> Moreover, an adjustment for a tax rebate will be permitted only to the extent such taxes are added to or included in the price of the merchandise when sold in the home market. *To the extent the exporter absorbs indirect taxes in sales in the home market,* no adjustment will be made to purchase price.

Hearings Before the Senate Committee on Finance, H.R. 10,710, 93d Cong., 2d Sess. 310 (1974) (emphasis added). The italicized portion of this statement illustrates the fact that the committee recognized that not all taxes are included in the purchase price of the merchandise. A company may absorb some of the tax, rather than pass it entirely on to the purchaser. Thus, some method of measurement is needed to determine how much of the tax is actually "added to or included in the price of such or similar merchandise when sold in the country of exportation" as 19 U.S.C. § 1677a(d)(1)(C), requires.

Similarly the House report on the amendment creating the adjustment supports this conclusion:

> [A]n adjustment for such [indirect] tax rebates would be permitted only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation. This is to insure that the rebate of such taxes confers no special benefit upon the exporter of the merchandise that he does not enjoy in sales in his home market. *To the extent that the exporter absorbs indirect taxes in his home market sales, no adjustment to purchase price will be made* and the likelihood or size of dumping margins will be increased.

H.R. Rep. No. 571, 93d Cong., 1st Sess. 69 (1973) (emphasis added). Once again the legislative history indicates a recognition that taxes are not automatically passed on by the exporter in home market sales. Therefore, to comply with the language of 19 U.S.C. § 1677a(d)(1)(C), that U.S.P. only be raised "to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation," a tax pass through analysis must be undertaken.

Conclusion

Plaintiffs' Motion for Judgment Upon the Agency Record is denied in part and remanded in part. The Department of Commerce's *Final Determination of Sales at Less Than Fair Value: Silicon Metal from Argentina,* is reversed with respect to Commerce's failure to determine the pass through tax incidence for the Reembolso tax under 19 U.S.C. § 1677a(d)(1)(C). This action is remanded to Commerce for recalculation of the United States Price adjustment, and Commerce is directed to

measure the tax incidence of qualifying taxes under the Reembolso program in a manner consistent with the Court's opinion. Commerce shall report the results of its remand determination to the Court within 60 days of the date hereof. Plaintiffs may respond within 15 days from the filing of the remand determination with the Court. Plaintiffs' Motion for Judgment Upon the Agency Record is denied in all other respects.

(Slip Op. 93–5)

SYNERGY SPORT INTERNATIONAL, LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–11–00836

[Plaintiff's motion for partial summary judgment is granted.]

(Dated January 12, 1993)

Sandler, Travis & Rosenberg (*Leonard L. Rosenberg* and *Ronald W. Gerdes*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Susan Burnett Mansfield*) for defendant.

OPINION

RESTANI, *Judge:* Plaintiff, Synergy Sport International, Ltd. ("Synergy"), challenges the decision of the United States Customs Service ("Customs"), which valued imported goods at the price paid by the U.S. customer to the importer rather than the price paid by the importer to its foreign supplier. Both Synergy and the United States move for partial summary judgment on the issue of which price provided the proper basis for valuation. Synergy's motion is granted, and the United States' motion is consequently denied.

BACKGROUND

This case involves three main players: a manufacturer, an importer, and a U.S. customer of the importer. The China National Textiles Import and Export Corporation ("Chinatex"), which manufactured the goods, is located in the People's Republic of China. Synergy, the importer, is a Hong Kong corporation with offices in the United States.[1] The U.S. customer of Synergy is J.C. Penney Co., Inc. ("J.C. Penney").

In a "sales confirmation" agreement dated November 21, 1990, Chinatex and Synergy agreed to "close * * * transactions" concerning the manufacture of 17,000 dozen cotton twill pants. Synergy promised

[1] Although the government admits only that Synergy is allegedly organized under the laws of Hong Kong, the government has not submitted any evidence to refute that allegation.

to buy 10,000 dozen pants at $58.00 per dozen and 7,000 dozen higher quality pants at $61.00 per dozen. Plaintiff's Appendix ("App.") at 52.

During the fall of 1990, a J.C. Penney representative made inquiries into Synergy's ability to supply a pant made to J.C. Penney's specifications. J.C. Penney provided Synergy with a sample pant, which was used by Chinatex to manufacture a sample production pant. After seeing the sample production pant, J.C. Penney ordered cotton twill pants from Synergy's U.S. representative on December 12, 1990 at a price of $10.29 per unit, or $123.48 per dozen. Synergy's U.S. office accepted the order the next day.

Synergy subsequently obtained from Overseas Trust Bank Ltd. a letter of credit issued on December 18, 1990 and amended on December 28, 1990, directing the bank to pay Chinatex $58.00 per dozen for 2,044 dozen pants. *Id.* at 53–56. Chinatex was unable to draw upon the funds made available by the letter of credit until it provided the bank with an onboard bill of lading. *Id.* at 53. The bill of lading was issued January 15, 1991 when the goods were transferred to a common carrier. *Id.* at 60.

The merchandise arrived in Oakland, California, the port of entry, on or about February 14, 1991. Synergy attempted to enter the merchandise at the price which it had paid to the manufacturer, namely, $58.00 per dozen with some adjustments. Customs rejected this attempted entry and valued the merchandise at the price which J.C. Penney had contracted to pay Synergy, far higher than the Synergy-Chinatex price. Customs released the merchandise on March 1, 1991 and Synergy subsequently shipped it to J.C. Penney. Synergy received payment in the form of a check from J.C. Penney dated April 22, 1991. Liquidation occurred on July 12, 1991. Synergy protested the valuation, and Customs denied the protest. Synergy then filed this action.

Standard of Review

To prevail on a motion for summary judgment, the movant must demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In addition, the plaintiff has the burden of presenting sufficient evidence to overcome the presumption that the Customs Service has valued the merchandise correctly. 28 U.S.C. § 2639(a)(1) (1988); *see Orbisphere Corp. v. United States,* 13 CIT 866, 866, 726 F. Supp. 1344, 1344 (1989).

Discussion

The preferred statutory basis for the valuation of imported merchandise is transaction value, defined as "the price actually paid or payable for the merchandise when sold for exportation to the United States." 19 U.S.C. § 1401a(b)(1) (1988).[2] The statute further provides that merchandise may *not* be valued on the basis of "a system that provides for

[2] Less preferred bases are deductive value, or the price at which the merchandise is sold after importation into the United States, 19 U.S.C. § 1401a(a)(1)(D), (d)(2)(B), and computed value, which consists of amounts for the cost of raw materials and labor, profit and general expenses. *Id.* § 1401a(a)(1)(E), (e)(1).

the appraisement of imported merchandise at the higher of two alternative values." *Id.* § 1401a(f)(2)(B).

Neither party seriously argues that the sales confirmation agreement constitutes a proper basis for the statutory valuation of imported merchandise.[3] The Customs Service contends that the Synergy-J.C. Penney sale, as the transaction which most directly caused exportation to the United States, should be used to calculate the transaction value of the imported merchandise. Synergy argues that Customs is statutorily required to value the transaction based on the Chinatex-Synergy sale, the lower of two alternative values.

Although this court in the past has acknowledged Customs' policy of valuing imports based on the sale which most directly caused the exportation, *see, e.g., Brosterhous, Coleman & Co. v. United States,* 14 CIT 307, 309, 737 F. Supp. 1197, 1199 (1990), recent Federal Circuit law has expressed serious disapproval of the "most direct cause of exportation" test:

> we can discern nothing in the legislative history of the 1979 amendment that suggests that Customs, in determining the transaction value of imported merchandise, should undertake an investigation focusing on which of two transactions most directly caused the exportation. The "Customs policy" followed by *Brosterhous* proceeds from an invalid premise. To the extent *Brosterhous* * * * require[s] a weighing of the relative importance of two viable transactions, it is overruled.

Nissho Iwai American Corp. v. United States, No. 92–1239, Slip Op. at 16 (Fed. Cir. Dec. 28, 1992). This court also notes that if the "most direct cause of exportation" test compels use of the middleman-retailer price whenever the retailer's order causes the middleman to complete a sale with the exporter, Customs likely will have enacted a system requiring use of the alternative higher price in conflict with 19 U.S.C. § 1401a(f)(2)(B).

In place of the "most direct cause of exportation" test, the Federal Circuit in *Nissho Iwai* applied the standard followed in *E.C. McAfee Co. v. United States,* 6 Fed. Cir. (T) 92, 842 F.2d 314 (Fed. Cir. 1988). *Nissho Iwai,* No. 92–1239, Slip Op. at 16. The standard in *McAfee* is that "if the transaction between the manufacturer and the middleman falls within the statutory provision for valuation, the manufacturer's price, rather than the price from the middleman to his customer, is used for appraisal." *McAfee,* 6 Fed. Cir. (T) at 97, 842 F.2d at 318. A transaction viable under the statute is a sale negotiated at arm's length free from any nonmarket influences and involving goods clearly destined for export to the United States. *Nissho Iwai,* No. 92–1239, Slip Op. at 10–11.

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[3] Synergy argues that a completed exchange of goods, rather than a contract for sale such as the sales confirmation agreement, is the proper statutory basis for valuation. The Customs Service contends that the sales confirmation agreement is neither a sale nor a contract for sale. At oral argument, both parties presumed that Hong Kong or Chinese law governed the agreement, but neither knew whether such an agreement would be binding under the laws of those countries.

In the case currently being decided, there was no allegation that the price paid by Synergy to Chinatex was artificially low due to a lack of arm's length bargaining or nonmarket conditions. Moreover, the merchandise involved was clearly destined for export to the United States. Not only were the goods shipped directly from Chinatex to Oakland, California, but also "[t]he labels required to be placed on the garments * * * reflect the fact the goods are destined for the United States, and always for a particular ultimate customer." Plaintiff's Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment at 5.[4] Therefore, the Synergy-Chinatex transaction constitutes a statutorily viable sale.

In short, prior case law directs Customs to rely on the sale between the middleman and the manufacturer to determine transaction value if the sale falls under the statute. Thus, the United States Customs Service erred when it valued the imported merchandise at the price paid by the U.S. customer to the importer, rather than the price paid by the importer to the manufacturer. In light of this conclusion, there is no need to consider whether the sale between Synergy and J.C. Penney is one "for exportation" within the meaning of 19 U.S.C. § 1401a(b)(1). Plaintiff's motion for partial summary judgment on the issue of improper valuation is granted.

[4] As the Federal Circuit has stated, "[a] determination that goods are being sold or assembled for exportation to the United States is fact-specific and can only be made on a case-by-case basis." *McAfee*, 6 Fed. Cir. (T) at 98, 842 F.2d at 319. This court, however, disagrees with defendant's contention that the site of incorporation or the nationality of the parties is important to a case-by-case analysis. Excess reliance on the incorporation or nationality of the parties can only lead to misapplication of the statute.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C93/7 1/12/93 Tsoucalas, J.	Bunzl Speciality Materials Inc.	90–11–00613, etc.	355.2520 12.5%	253.1500 3.4%	Agreed statement of facts	Savannah Surgical crepe paper
C93/8 1/13/93 Aquilino, J.	E. Gluck Corp.	85–08–01134	716.09–716.45 715.05, etc., Various Rates	688.40, 688.45, 688.43, 688.42, etc., Various rates	Belfont Sales Corp. *v.* United States, 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* United States, 673 F.2d 1375 (1982)	New York N.Y. Quartz analog watches, etc.
C93/9 1/14/93 Goldberg, J.	NEC Electronics, U.S.A., Inc.	84–04–00530	708.29, 708.89, 712.05 16.3%; 14.7%; 13.1%; etc.	684.62, 712.49, 685.90, rates in effect at the time of entry	Agreed statement of facts	San Francisco Telecommunications fiber optic cable, equipment, etc.

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